739

SUPREME COURT OF THE UNITED STATES.

No. 44.

THE MAYOR, ALDERMEN, AND INHABITANTS OF THE CITY OF NEW ORLEANS, PLAINTIFFS IN ERROR,

VERSUS

CHRISTOVAL G. DE ARMAS AND MANUEL SIMON CUCULLU.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

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UNITED STATES OF AMERICA:

SUPREME COURT, *State of Louisiana.*

Copy of the transcript of the proceedings had in the district court for the first judicial district, and of all the proceedings had in our said Supreme Court, in a certain case wherein Christoval G. De Armas and M. S. Cucullu were plaintiffs, and the Mayor, Aldermen, and Inhabitants of New-Orleans, were defendants.

STATE OF LOUISIANA, *First Judicial District Court.*

Be it remembered, that, on the fourteenth day of September, in the year of our Lord one thousand eight hundred and thirty-one, into the district court in and for the first judicial district of the State of Louisiana, holden in the city of New Orleans, came Christoval G. De Armas and Manuel Simon Cucullu, by E. Mazureau, esq., their attorney, and filed the following petition, to wit:

Petition.

To the honorable the first District Court in and for the First Judicial District of the State of Louisiana:

The petition of Christoval Guillaume De Armas, of the city of New Orleans, attorney at law, and of Manuel Simon Cucullu, of the said city, merchant, humbly showeth:

That your petitioners are joint owners of a certain lot of ground situate in the city aforesaid, in the district aforesaid, and measuring eighty feet fron

and close to the foot of the old levee between St. Philippe and Main streets, and forty-six feet on the upper or right line, fifty-three feet on the lower or left line, and seventy-nine feet and six inches on the rear and close to the public road, and composing a superficie of three thousand one hundred and seventy-six feet and four inches.

That the said lot was formerly occupied, built upon, and bona fide, possessed by a certain Thomas Beltram, alias Bertrand, to the knowledge and with the permission and authorization of the Spanish Government, from the month of March, one thousand seven hundred and eighty-eight, to the time of his death, which took place on the 24th of April, eighteen hundred and three, and from this latter period, by Catherine Gonzales, his widow, and by his heirs who, some time in the year ———, did of their own accord demolish the buildings which they had thereon, and removed to another part of this city. And your petitioners show, that, when the said buildings were thus demolished, the heirs of the said Thomas Bertrand were all minors, and the said Catherine Gonzales, their mother, acting for herself, as well as for them, did so far reserve their right of possession and ownership in and to the said lot, that she took all the necessary legal steps to have their title to the same confirmed by the United States. That the titles by which the said Thomas Bertrand held the said lot of ground was duly recorded in the land office, and that, upon the claim thereof by the said widow, the commissioners of the said land office reported so favorably, that they said that "it would be more an act of justice than of generosity if the Government should confirm it." All which will more fully appear from the authenticated copy of said report hereunto annexed, and prayed to be made a part of this petition. And your petitioners further show, that since the said report of the land commissioners, upon the claim of the said Catherine Gonzales, of the lot aforesaid, the Congress of the United States have, by an act approved on the 11th May, 1820, entitled "An act supplementary to the several acts for the adjustment of land claims in the State of Louisiana," confirmed the said claim against any claim on the part of the United States, and that subsequently, to wit, on the seventeenth day of February, one thousand eight hundred and twenty-one, the United States, by letters patent issued and signed by James Monroe, then President of the said United States, and countersigned by Josiah Meigs, then Commissioner of the General Land Office, and by the latter sealed with the seal of his office, have granted the said Catherine Gonzales, her heirs and assigns, for ever, the aforesaid lot of ground, all which will clearly appear by a duly authenticated copy of the said letters patent, which is hereunto annexed, and the original of which your petitioners are ready to produce. And your petitioners further show that, since the issuing of said letters patent, to wit: on the twenty-fifth day of March, in the year 1826, the said Catherine Gonzales departed this life, and that on the sixth day of May, eighteen hundred and thirty, Manuel Bertrand, Joseph Bertrand, and others, the legitimate and only heirs of the said Catherine Gonzales, have, by a notarial deed passed before William Christy, notary public in the city of New Orleans aforesaid, and for a valuable and just consideration, sold the above described lot of ground to your petitioners.

And your petitioners further show that, prior to the cession of the colony of Louisiana to the King of Spain by France, the lot of ground aforesaid belonged to the King of France; that by the laws of Spain, which were introduced in the said colony of Louisiana after the said cession, the King of

Spain, by himself or by his officers, had an uncontrovertible right of disposing of the same. That, by the retrocession of the aforesaid colony to France by the King of Spain, the French Government was repossessed of all the titles and rights which it formerly had to the abovementioned lot of ground which (if it was not the property of the aforesaid Thomas Bertrand) repassed from the King of Spain to the Government of France ; the King of Spain having at no time whatever, and by no act of any kind, divested himself of his right of ownership in and to the aforesaid lot of ground in favor of any person or persons, private or public, or body corporate whomsoever, except the said Thomas Bertrand. That, by the treaty of cession of Louisiana to the United States by France, the said United States clearly acquired every lot of ground, land, squares, (emplacemens terrain) buildings, fortifications, edifices therein, which were not private property, and that the grant made by the aforementioned letters patent, and therefore justly and lawfully vest the said Catherine Gonzales with all the rights of ownership and possession which all the different Governments who had possessed Louisiana, had or could have to the said lot of ground.

But your petitioners further show, that under the frivolous pretence that the said premises were or made part of certain *quays* which are figured on a map said to be the original map of the city of New Orleans, the Mayor, Aldermen and Inhabitants of the city of New Orleans, have, by means of certain works by them caused to be done since the said Catherine Gonzales has ceased voluntarily to have the corporal possession of the said lot of ground, enlarged the levee in front of the city aforesaid, so as to embrace the lot of ground aforesaid, and do pretend, without any just or legal title or rights whatever, that the said lot of ground belongs to them, and do prevent your petitioners to use the same, to the great damage of your petitioners, which damages your petitioners say are of the sum of ten thousand dollars.

Your petitioners therefore pray, that the said Mayor, Aldermen, and Inhabitants of the city of New Orleans, may be cited to appear and answer this petition, and that it may be adjudged and decreed that your petitioners are the only true and lawful owners and proprietors of the above described property, and that the said Mayor, Aldermen and Inhabitants, have no right whatever in, to, or upon the same.

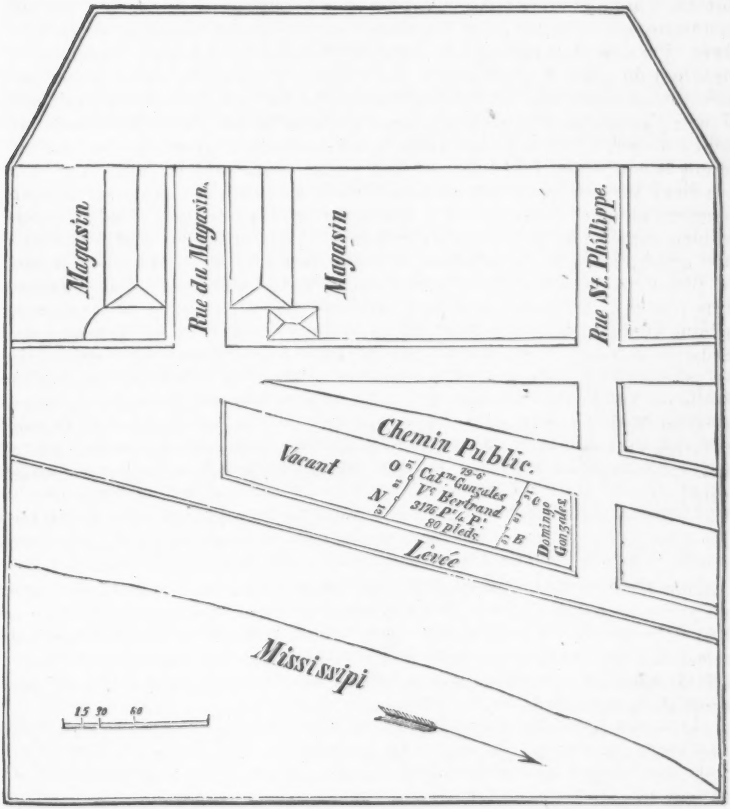
That your petitioners may be confirmed in the rights of possessing, using and enjoying the said lot of ground, and that the said Mayor, Aldermen and Inhabitants, may be enjoined from disturbing them in the free exercise of said rights, and adjudged and decreed to pay to your petitioners the said sum of ten thousand dollars, together with the costs of this suit.

And, as in duty bound, your petitioners will ever pray.

(Signed) MAZUREAU, *of Counsel for Petit'rs.*

(1.)

Document annexed to Petition.



Survey.

A la Nouvelle Orléans le 1er. Septembre, 1807. Je soussigné Barthelemy Lafon, arpenteur députés par Isaac Briggs, arpenteur géneral des territoires sud du Tennessee, certifie m'être transporté à la réquisition de Made. Veuve Bertrand, résidant en ville sur une terre située au dit quartier pour en mesurer l'étendue, fixer les bornes ou les renouveller si besoin était, établir les lignes entre voisins, limitrophes, &c.

Etant sur les lieux je l'ai requis de me produire les pièces qui l'autorisaient á faire exécuter l'opération et elle m'a présenté les suivantes; 1. Une autorisation du 28 Mars, 1788, par laquelle Mr. Miro, ci-devant gouverneur de cette province, lui accorde la permission de s'établir sur la dite terre; 2. Une autorisation du 16 Juin, 1794, par laquelle Mr. de Carondelet, gou-

verneur, lui accorde la permission de rétablir les édifices situés sur le dit lot de terre.

Alors étant présens les voisins limitrophes, Domingo Gonzales, Pierre Survin, témoin d'assistance, j'ai procédé á la mesure de la dite terre. Je me suis transporté au point A, et là prenant une direction perpendiculaire à la levée, j'ai ouvert et cornoyé la ligne limitrophe à Domingo Gonzales, et mesurant du point A deux toises, j'ai planté une borne B; de ce point mesurant trois toises sur un terrain couvert de clotures, j'ai planté un autre piquet; j'ai continué de mesurer jusqu'au point E, où j'ai arrété la mesure; étant à 23 pieds plus loin sur la rue, toute cette ligne ayant en profondeur depuis la conquette, huit toises et cinq pieds; retournant au point A, je me suis élevé sur une ligne courant parallile à la levée et j'ai mesuré sur la ligne ponctuée un quart d'arpent 5 et $\frac{5}{6}$ toises, formant la face de la dite habitation ou bien quatrevingt pieds mesure française. Arrivé au point M, j'ai dirigé mon graphomètre au perpendiculaire de la levée, et mesurant deux toises, j'ai planté un piquet en N. De ce point mesurant trois toises, j'ai planté un autre piquet en O; mesurant encore deux et $\frac{2}{3}$ toises, j'ai arrêté mes mesures; la ligne ayant en longueur un quart d'arpent et $\frac{1}{6}$ de toise ou quarante six pieds; de ce point P, suivant le chemin, j'ai mesuré soixante dix neuf pieds, six pouces de P en E où j'ai terminé mes mesures. De telle sorte qu'il résulte en faveur de Catherine Gonzales, Veuve Bertrand, un lot de terre borné au N. E., par Domingo Gonzales, au S. E. par la levée, au S. O. par les terres vacantes, et au N. O. par le chemin public; ayant en surface 3,176 pieds quatre pouces. En foi de quoi, j'ai donné le prèsent plan et procès verbal. LAFON.

Petition.

Señor Gobernador: Antonio Beltran vecino esta ciudad antè V. S. con el mas profondo respeto dice: Que habiendo sele quemado la casa que habitaba el 21 del corriente y hallarse sin tener donde refugiarse, ha determinado formar una piquina casa en frente de la de Mr. Bienvenu por tanto, A V. S. suplica rendidamente se digne concederle licencia para ello. Gracia que espera de la bondad de V. S. Nueva Orleans, 28 de Marzo de 1788.

Decree.

Como lo pide.

(Signed) MIRO.

Petition.

Señor Gobernador General: Thomas Bertran, cabaretero en esta ciudad a V. S. con el mas profundo respeto dice: que hace tres meses presento a V. S. un memorial suplicandole le concediese el permiso de reedificar una cabana ó casita que tiene frenté á la levee, frente de la casa de el señor auditor de guerra, con motivo de haberse le podrida las maderas de dicha casa par la mucha continuancion de las aguas, echandole a perder la poca ropa que tiene y la de sus hijos; en esta atencion y en la de estarse hundien el techo: A. V. S. suplica rendidamente se sirva por un efecto de su muy justificada piedal, darle su licencia para la redificacion de dicha casa, pues esta expuesto de una disgracia segun la disposicíon en que se hallan dichas maderas.

Favor que espera recibir de la grande benignidad de V. S. Cuya importante vida ruega á Dios guarde dilatados años.

Nueva Orleans, 17 de Junio de 94.

(Firmad) THOMAS BELTRAN.

Decree.

Nueva Orleans, Junio 16 de 1794. Concedido contalque se guarde las mismas dimenciones que tiene la actual.

EL BARON DE CARONDELET.

Evidence.

Nous soussignés habitants du comté d'Orléans, résidant en la vílle de la Nouvelle Orléans, certifions par ces présentes, qu'il est de notre connaissance que Made. Veuve Bertrand (épouse actuelle de Domingo Gonzales) et son défunt mari ont jouis paisiblement, avec la permission du Gouvernement Espagnol, et possédé sans interruption quelconque, pendant l'espace de dix ans et plus, avant la cession de cette colonie á la République Française, un lot de terre sur lequel ils ont habité depuis l'epoque de la premiere incendie qui eût lieu en cette capitale en l'année 1788; lequel terrain est situé sur la devanterre de cette ville, faisant face au fleuve, vis-á-vis la maison occupié par Mr. Trémoulet, attenant d'un côté aux propriétés de Domingo Gonzales, de l'autre aux terres vacantés, par devant á la levée et par derriére au chemin public. En foi de quoí, á la demande de la susdite dame nous avons délivré le présent pour servir et valoir au besoin á la Nouvelle Orleans ce douze Septembre, 1807.

(Signé) HENRY MINTINGER,
ARNAUD MAGNON,
JN. PINARD.

(No. 329.)

Catherine Gonzales, widow Bertrand, claims a lot of ground situate in the city of New Orleans, fronting on the levee, and containing a superficies of three thousand one hundred and seventy-six feet and four inches in a square form, and bounded on the N. E. by the property of Domingo Gonzales, on the N. W. by the main road, on the S. W. by vacant land, and on the S. E. by the levee aforesaid.

It appears that, on the twenty-seventh of March, 1788, a few days after the fire which consumed a considerable portion of this city, Thomas Bertrand, the late husband of the claimant, and who was a sufferer by the fire, petitioned Governor Miro for leave to build himself a house on the lot of ground now claimed, which was accorded to him by the governor. It appears also that in the year 1794, he presented another petition to the Baron de Carondelet, requesting permission to reconstruct his house, as the materials of which it was built were much decayed, which request was also accorded upon condition that the house should be reconstructed according to its former dimensions. This lot of ground has been inhabited by the late husband of the claimant from the year 1788 until his death, and by the claimant since that period to this day. As we do not feel authorized to make any decision on this claim, we think it would be more an act of justice than of generosity if the Government should confirm it.

LAND OFFICE, NEW ORLEANS.

I, the undersigned, register of the land office for the eastern district of Louisiana, do hereby certify that the foregoing plan, proces verbal, petitions, and decrees, are true copies from a register now in my possession, entitled "Register C, No. 3, of the claims to land recorded in the register's office, and laid before the board of commissioners of the eastern district of the territory of Orleans, at their third session," and that the foregoing report, No. 329, is also a true copy from a book also in my possession, entitled "Eastern District Decisions, &c."

In faith whereof, I hereunto subscribe my name at the city of New Orleans, this 24th day of March, 1830.

(Signed) HILARY B. CENAS,
Register East. Dist. La.

(2.)

Document annexed to Petition.

James Monroe, President of the United States of America, to all to whom these presents shall come, GREETING:

Know ye, that Catherine Gonzales, formerly the widow of Thomas Bertrand, having deposited in the General Land Office a certificate, numbered one, of the register of the land office at New Orleans, whereby it appears that, in pursuance of an act of Congress passed the 2d of March, 1805, entitled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans, and the district of Louisiana," and in pursuance of an act of Congress, passed the 12th of April, 1814, entitled "An act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri," the said Catherine Gonzales is confirmed in her claim for a lot of land in the city of New Orleans, fronting on the levee, containing a superficies of three thousand one hundred and seventy-six feet and four inches in a square form, and bounded on the northeast by the property of Domingo Gonzales, on the northwest by the main road, on the southwest by vacant land, and on the southeast by the levee aforesaid. There is therefore granted by the United States unto the said Catherine Gonzales, (subject to the provisions of the act first named,) the tract of land above described, to have and to hold the said tract, with the appurtenances, unto the said Catherine Gonzales, her heirs and assigns, for ever.

In testimony whereof, I have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the seventeenth day of February, in the year of our Lord one thousand eight hundred and twenty-one, and of the independence of the United States of America the forty-fifth.

[L. S.] By the President:

(Signed) JAMES MONROE.

(Signed) JOSIAH MEIGS,
Commissioner of the General Land Office.

GENERAL LAND OFFICE.

I certify that the above is a true copy from the records of this office. In

testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, the 24th day of June, 1830.

[SEAL.] (Signed) GEO. GRAHAM,
Commissioner of the General Land Office.

(3.)

Document annexed to Petition.

STATE OF LOUISIANA, *City of New Orleans.*

Be it known that this day before me, William Christy, notary public in and for the city and parish of New Orleans, State of Louisiana, duly commissioned and sworn, personally came and appeared Manuel Bertrand and Joseph Bertrand, both of this city, Joseph Taquino, wife of Maximilien Portal, of this city, being therein duly assisted and authorized by her said husband, here present and approving; and Adelaide Taquino, also of this city, a minor above the age of puberty, being herein duly assisted by the said Manuel Bertrand, her curator ad bona.

Which said appearers, acting as the only and legitimate heirs of the late Catherine Gonzales, widow of Thomas Bertrand, deceased, declared that for and in consideration of the sum of twelve thousand dollars to them in hand well and truly paid by Christoval Guillaume De Armas and Manuel Simon Cucullu, of this city, the receipt whereof is hereby acknowledged by them the said appearers, they do, by these presents, grant, bargain, sell, transfer, assign, and set over, with a full guarantee against all troubles, mortgages, claims, evictions, debts, or other encumbrances whatsoever, unto the said Christoval Guillaume De Armas and the said Manuel Simon Cucullu here present, accepting and purchasing for themselves, their heirs and assigns, in the proportion of one-half each, and acknowledging possession thereof, a certain portion or lot of vacant ground situate in this city between St. Philippe and Main streets, measuring seventy-nine feet six inches on Levee street, eighty feet on the levee, front to the river, forty-six feet in width on the southwest line, and fifty-three feet in width on the northeast line, which separates it from the property formerly owned by Domingo Gonzales, and containing a superficies of three thousand one hundred and seventy-six feet four inches, more or less, all French measure, a plan of which said portion of land is to be found regularly registered, together with certain documents thereunto appertaining, at page thirty-one, "Register C, No. 3, of the claims to land recorded in the register's office, and laid before the board of commissioners of the eastern district of the territory of Orleans, at their third session," in the land office at New Orleans, for which said portion of ground a patent was issued by James Monroe, then President of the United States, on the seventeenth day of February, eighteen hundred and twenty-one.

To have and to hold the said lot or portion of ground unto the said vendees, their heirs and assigns, to their proper use and behoof for ever, and the said vendors, for themselves and their heirs, the said lot or portion of ground to the said vendees, their heirs and assigns, shall and will warrant and for ever defend against the lawful claims of all persons whomsoever, by these presents.

LAND OFFICE, NEW ORLEANS.

I, the undersigned, register of the land office for the eastern district of Louisiana, do hereby certify that the foregoing plan, proces verbal, petitions, and decrees, are true copies from a register now in my possession, entitled "Register C, No. 3, of the claims to land recorded in the register's office, and laid before the board of commissioners of the eastern district of the territory of Orleans, at their third session," and that the foregoing report, No. 329, is also a true copy from a book also in my possession, entitled "Eastern District Decisions, &c."

In faith whereof, I hereunto subscribe my name at the city of New Orleans, this 24th day of March, 1830.

(Signed) HILARY B. CENAS,
Register East. Dist. La.

(2.)

Document annexed to Petition.

James Monroe, President of the United States of America, to all to whom these presents shall come, GREETING:

Know ye, that Catherine Gonzales, formerly the widow of Thomas Bertrand, having deposited in the General Land Office a certificate, numbered one, of the register of the land office at New Orleans, whereby it appears that, in pursuance of an act of Congress passed the 2d of March, 1805, entitled "An act for ascertaining and adjusting the titles and claims to land within the territory of Orleans, and the district of Louisiana," and in pursuance of an act of Congress, passed the 12th of April, 1814, entitled "An act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri," the said Catherine Gonzales is confirmed in her claim for a lot of land in the city of New Orleans, fronting on the levee, containing a superficies of three thousand one hundred and seventy-six feet and four inches in a square form, and bounded on the northeast by the property of Domingo Gonzales, on the northwest by the main road, on the southwest by vacant land, and on the southeast by the levee aforesaid. There is therefore granted by the United States unto the said Catherine Gonzales, (subject to the provisions of the act first named,) the tract of land above described, to have and to hold the said tract, with the appurtenances, unto the said Catherine Gonzales, her heirs and assigns, for ever.

In testimony whereof, I have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, the seventeenth day of February, in the year of our Lord one thousand eight hundred and twenty-one, and of the independence of the United States of America the forty-fifth.

[L. S.] By the President:

(Signed) JAMES MONROE.

(Signed) JOSIAH MEIGS,
Commissioner of the General Land Office.

GENERAL LAND OFFICE.

I certify that the above is a true copy from the records of this office. In

testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, the 24th day of June, 1830.

[SEAL.] (Signed) GEO. GRAHAM,
Commissioner of the General Land Office.

(3.)

Document annexed to Petition.

STATE OF LOUISIANA, *City of New Orleans.*

Be it known that this day before me, William Christy, notary public in and for the city and parish of New Orleans, State of Louisiana, duly commissioned and sworn, personally came and appeared Manuel Bertrand and Joseph Bertrand, both of this city, Joseph Taquino, wife of Maximilien Portal, of this city, being therein duly assisted and authorized by her said husband, here present and approving; and Adelaide Taquino, also of this city, a minor above the age of puberty, being herein duly assisted by the said Manuel Bertrand, her curator ad bona.

Which said appearers, acting as the only and legitimate heirs of the late Catherine Gonzales, widow of Thomas Bertrand, deceased, declared that for and in consideration of the sum of twelve thousand dollars to them in hand well and truly paid by Christoval Guillaume De Armas and Manuel Simon Cucullu, of this city, the receipt whereof is hereby acknowledged by them the said appearers, they do, by these presents, grant, bargain, sell, transfer, assign, and set over, with a full guarantee against all troubles, mortgages, claims, evictions, debts, or other encumbrances whatsoever, unto the said Christoval Guillaume De Armas and the said Manuel Simon Cucullu here present, accepting and purchasing for themselves, their heirs and assigns, in the proportion of one-half each, and acknowledging possession thereof, a certain portion or lot of vacant ground situate in this city between St. Philippe and Main streets, measuring seventy-nine feet six inches on Levee street, eighty feet on the levee, front to the river, forty-six feet in width on the southwest line, and fifty-three feet in width on the northeast line, which separates it from the property formerly owned by Domingo Gonzales, and containing a superficies of three thousand one hundred and seventy-six feet four inches, more or less, all French measure, a plan of which said portion of land is to be found regularly registered, together with certain documents thereunto appertaining, at page thirty-one, "Register C, No. 3, of the claims to land recorded in the register's office, and laid before the board of commissioners of the eastern district of the territory of Orleans, at their third session," in the land office at New Orleans, for which said portion of ground a patent was issued by James Monroe, then President of the United States, on the seventeenth day of February, eighteen hundred and twenty-one.

To have and to hold the said lot or portion of ground unto the said vendees, their heirs and assigns, to their proper use and behoof for ever, and the said vendors, for themselves and their heirs, the said lot or portion of ground to the said vendees, their heirs and assigns, shall and will warrant and for ever defend against the lawful claims of all persons whomsoever, by these presents.

The said lot or portion of ground was inherited by the said vendors, from Thomas Bertrand, and Catharine Gonzales, his wife, father and mother of the said Manuel Bertrand and Joseph Bertrand, and grandfather and grandmother of the said Joseph Taquino, Irène Taquino, wife of Maximilien Portal as aforesaid, and Adelaide Taquino, the three last inheriting from their late mother Mrs. Rosalie Bertrand, wife of Joseph Taquino, and daughter of the said Thomas Bertrand, and his said wife Catharine Gonzales.

From the annexed certificate of the recorder of mortgages for this city, dated this day, it appears that there are no mortgages on the said property recorded against the succession of Catherine Mendez, alias Gonzales, widow of Thomas Bertrand.

Thus done and passed at the city of New Orleans, in presence of H. B. Cenas and M. Murphy, witnesses of lawful age, domiciliated in this city, and requested to be present, who hereunto sign their names together with the parties and me, said notary, this sixth day of May, in the year one thousand eight hundred and thirty.

At the moment of signing, the said Manuel Bertrand declared that he could not sign his name, not knowing how to write, and makes his ordinary mark to these presents for himself, and as *curator ad bona* of Adelaide Taquino, the minor aforesaid.

(Original signed) MANUEL BERTRAND, his x mark.
JOSEPH BERTRAND,
JOSEPH TAQUINO, Jr.,
ADELAIDE TAQUINO,
FRD. M. PORTAL,
IRENE TAQUINO,
CHRISTOVAL G. DE ARMAS,
M. S. CUCULLU,
H. B. CENAS,
MARTIN MURPHY.
WILLIAM CHRISTY, *Not. Pub.*

I certify the foregoing to be a true copy of the original extract in my register; for faith whereof I grant these presents, under my signature, and the impress of my seal of office, at New Orleans, this 7th day of May, 1830.

(Signed) WILLIAM CHRISTY, *Not. Pub.*

Citation.

STATE OF LOUISIANA, *First Judicial District Court.*

CHRISTOVAL G. DE ARMAS AND MANUEL SIMON CUCULLU, *vs.* THE MAYOR, ALDERMEN, &c., } 9,587.

The Mayor, Aldermen, and Inhabitants, of the City of New Orleans.

You are hereby summoned to comply with the prayer of the petition, of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the first judicial district court in the city of New Orleans, in ten days after the service hereof.

Witness, the Honorable Joshua Lewis, judge of the said court, the 14th day of September, in the year of our Lord 1831.

(Signed) JNO. L. LEWIS, *Clk.*

Sheriff's Return.

Received Wednesday, September 14, 1831, and served on the same day, copy of petition and citation on the defendants, by handing the same to D. Prieur, esq , mayor, in person. Returned September 20, 1831.

(Signed) J. H. HOLLAND, *Dy. Sheriff.*

Afterwards, to wit, on the fifth day of November, in the year aforesaid, into the court aforesaid, came the defendants, by Moreau Lislet, esq., their attorney, and filed the following answer, to wit:

Answer.

The answer of the Mayor, Aldermen, and Inhabitants, of the city of New Orleans, to the petition of Christoval Guillaume De Armas and Manuel Simon Cucullu, residing in the city of New Orleans.

These defendants, in answer to the said petition, say that they deny all and singular the facts therein set forth.

And these defendants further say, that even admitting, which they deny, that it be true, as is alleged in the said petition, that one Thomas Beltran or Bertrand, under whose heirs the said petitioners now claim, should have obtained at any time from the Spanish Government a permission to make certain buildings on the parcel of land now claimed by the petitioners, said permission, as well as the patent of the United States by which it was confirmed, as stated in the said petition, cannot be considered as a good title to the ownership of the same, because the Spanish Government has never made to the said Beltran or Bertrand an absolute grant of the said parcel of land, but only permitted to him to build, temporary, a cabin thereon, in consequence of his having suffered the loss of the house and buildings, which he did hold in this city, in the general conflagration which took place in this city in the beginning of the year 1788.

And these defendants further say, that the petitioners, as claiming under the title of the heirs of the said Thomas Beltran or Bertrand and wife, cannot have more right to claim the said lot than their vendors should have had, because it had been finally adjudged by a competent court; that the widow and heirs, Bertrand, had no title to the said parcel of land, and were to be compelled to pull down the cabin and other buildings which they had erected thereon, in a suit which was brought before the late superior court of the territory of Orleans, by the corporation of the city of New Orleans, against the widow and heirs of the said Thomas Beltran or Bertrand, some time in the year 1811 or 1812.

And the said defendants further say, that even supposing, which they do deny, that the Spanish Government would have at any time made an absolute grant of the said parcel of land to the said Beltran or Bertrand, the said grant should be null and void, because the said parcel of land made a part of the quays of this city; that is, one of those public things which even the sovereign himself had no authority to dispose of, to the prejudice of the public, without a flagrant abuse of his powers.

And these defendants further say, that at the time of the foundation of the city of New Orleans under the French Government, said Government left between the bank of the river Mississippi and the first row of houses fronting the said river, a large space emptied and unoccupied, under the name of quays, and intended to serve and to be reserved as such for the use of the inhabi-

tants of this city, as they exist in the several cities of France, and in her colonies, and as it is proved by the ancient plans of the city of New Orleans, which have been preserved in the office of the marine charts, maps, and plans, which existed at Versailles, in France.

Wherefore, these defendants pray to be hence dismissed, with their reasonable costs and charges.

(Signed) MOREAU LISLET, *of Counsel for Defendts.*

Afterwards, to wit, on the eighteenth day of February, in the year one thousand eight hundred and thirty-two, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

Order.

C. G. De Armas and M. S. Cucullu,
vs.
The Mayor, Aldermen, &c. } 9,587.

On motion of L Moreau Lislet, esquire, of counsel for the defendants, it is ordered by the court that a subpœna duces tecum issue in this case, directed to D. Augustin, esq., secretary of the city council, commanding him to bring into court on Monday next, the 20th day of the present month, the plan of the city of New Orleans, made in May, 1724, by Dupangé, and the plan of said city, made in the year 1728, by Broutin.

Afterwards, to wit, on the 3d day of March, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

Order.

C. G. De Armas and M. S. Cucullu,
vs.
The Mayor, Aldermen, &c. } 9,587.

On motion of L. Moreau Lislet, esquire, of counsel for the defendants, it it ordered by the court, that a subpœna duces tecum issue in this case, directed to D. Augustin, esq., secretary of the city counsel, commanding him to bring into court on Monday next, on the trial of the cause, the plan of the city of New Orleans, made in 1724 and 1728, which are deposited among the archives of said city council.

Afterwards, to wit, on the 5th day of March, in the year aforesaid, into the court aforesaid, holden as aforesaid, the following order was entered on record, and the following admission, testimony of plaintiffs, and testimony of defendants, and documents, were filed, to wit:

Order.

C. G. De Armas and M. S. Cucullu,
vs.
The Mayor, Aldermen, &c. } 9,587.

This cause came on to-day for trial before the court.

MAZUREAU, *for Plaintiffs.*
MOREAU, *for Defendants.*

When, after hearing testimony, the court ordered that the said cause be continued till to-morrow.

Admissions.

CHRISTOVAL G. DE ARMAS AND M. SIMON CUCULLU,
vs.
THE MAYOR, &c.

It is admitted—

1st. That there existed, since a long time before the French revolution, an office (or bureau) attached to the department of marine and colonies, at Versailles, in France, in which were deposited the manuscripts of all the plans of the cities founded under the authority of the French Government in its colonies.

2dly. That the plans of New Orleans, the one made by Dupangé in the year 1724, and the other by Broutin in the year 1728, and which were produced by the defendants in this case, are the most ancient plan of said city which were found in the said deposite.

3dly. That the said Dupangé and Broutin were both engineers for the King of France, and employed as such in Louisiana at the time they made the aforesaid plans.

(Signed) MAZUREAU, *of Counsel for Plaintiffs.*
MOREAU LISLET, *of Counsel for Defendants.*

Testimony of Plaintiffs.

C. G. DE ARMAS AND M. S. CUCULLU,
vs.
THE MAYOR, ALDERMEN, &c.
Testimony taken in open court, 5th March, 1832.

The plaintiffs offered in evidence the copy of the grant, with the petition, decree, and evidence, and plan annexed to their petition. The plaintiffs also introduced in evidence the copy of patent marked (2,) filed with their petition, and read the original of the same to the court; also, notarial act of sale, by the heirs of Thomas Bertrand to the plaintiffs, marked (3,) filed with their petition.

The plaintiffs also offered in evidence an original grant by the Baron Carondelet to Frs. Lioteau, dated 14th June, 1792, of a parcel of land situated in part of this city, between Bienville and St. Louis, and between the levee and the first row of houses. (Not filed.)

The plaintiffs also introduced in evidence a notarial act of sale, by John F. Miller and Patrick Norris, to the Mayor and Aldermen, and marked (4;) also notarial sale by A. Magnon to the Mayor and Aldermen, and marked (5.)

B. Bacas, witness for the plaintiffs, sworn, says, that he is fifty-one years of age; that he knew the late Thomas Bertrand, and knows that he, during his life time, and his widow and family after his death, occupied and possessed the house and lot as shown on the plan annexed to the grant and report of commissioners, which is filed with plaintiffs' petition; said Bertrand and his family possessed said lot and house before 1794, up till the year 1812, to the knowledge of witness.

Cross-examined.

That the house erected on said lot touched the levee. Witness recollects that there were some planks which kept up the earth before the house, and there was a descent from the levee to pass into the house.

Francois Lafargue, witness for the plaintiffs, sworn, says that he knew Thomas Bertrand, now deceased; witness also knows the lot and house which he formerly occupied in front of the city, as shown on the plan annexed to plaintiffs' petition; witness knows that said Thomas Bertrand, and his wife and family, continued to occupy and possess said house and lot from the year 1797 up till the year 1812.

Cross-examined.

That the house erected on the lot in question nearly touched the rear of the levee, and there were steps or planks placed to descend from the levee, which was higher than the floor of the house, into the same.

Principal examination resumed.

Witness knows that said Thomas Bertrand and Mr. Magnon, who occupied a house and lot near him, kept up and repaired the levee in front of their houses.

The plaintiffs also introduced in evidence the notarial receipts, marked (8,) also the document marked (9,) also the certificates births and interments, marked (10,) (11,) (12,) (13,) (14,) (15,) (16,) and (17.)

Document 4.

Pardevant Michel De Armas, notarie public à la résidence de la Nouvelle Orléans, Etat de la Louisiane, Etats Unis d'Amérique, et en présence des témoins ci aprés nommés et soussignés:

Furent présent les Sieurs John F. Miller, Patrick Norris, domiciliés en cette ville, lesquels ont conjointement et solidairement par ces présentes, vendu, cédé, délaissé et transporté, dés maintenant et à toujours, avec promesse de garantir de tous troubles, dous, dettes, hypothèques, evictions, aliénations, et de tous autres empêchemens généralement quelconques.

A la corporation de cette ville de la Nouvelle Orléans, Etat de la Louisiane, à cefaire, représentée par l'honorable Augustin Macarty, maire de la dite ville, agissant pour et au nom des membres de la dite corporation, en vertu de délibération du conseil de ville, en datè du cinq du courant et dûment approvée, à ce présent, acceptant et acquéreur pour les membres de la ditè corporation, leurs successeurs en office, et autres ayant causes.

Un terrain situé en cette ville, ayant quatrévingt deux toises et douze pieds quarrés de superficie, et formant un quárré irrégulier, lequel a cinquante trois pieds de face à la levée, cinquante deux pieds de face au chemin public, cinquante huit pieds du côté de sa limite, avec le Sieur Magnon, et cinquante six pieds de l'autre côté; ainsi et tel qu'il a été concédé au feu Sieur Henry Metzinger par le Sieur Baron de Carondelet le dix Août, mil sept cent quatrevingt quinze, alors gouverneur de la Louisiane pour sa majesté Catholique le Roi d'Espagne, et tel qu'il est tracé au plan figuratif d'icelui dressé par le Sieur Charles Trudeau, arpenteur royal et particulier de la Louisiane, le six du mois d'Août, mil sept cent quatrévingt quinze, dans la propriétè duquel terrain, ainsi concedé le dit feu Sieur Henry Metzinger, a été maintenu et confirmé par judgment de la Cour Suprême de cet Etat en date du trente Mai, mil huit cent quatorz; le tout tel qu'il se poursuit et comporte sans en rein excepter ni réserver, consentant les dits sieurs vendeurs dans le cas où le dit terrain auvait une plus grande contenue, que ce surplus de con-

tenue soit comprés dans la présente vente, comme en *en* faisant partie, sans qu'ils puissent dans aucun cas, et sous aucun pretexte quelconques, exercer à raison de ce, aucuns recours, ni réclamer aucune indemnité ni augmentation du prise qui sera ci après convenu pour la prèsente vente, à quoi ils renoncent formellement l'un et l'autre, par les présentes.

Le dit terrain ainsi que tous les édifices, bâtisses, constructions, entourages, circonstances et dépendances, qui se trouvent dessus et que le sieur acquéreur ès-qualités a declaré bréu connâitre et n'en pas exiger plus ample description, appartiennant aux sieurs vendeurs pour s'en être rendus propriétaires, de la mainère suivante, savoir: le Sieur Miller pour s'en être rendu adjudicataire, le sept Mars, mil huit cent seize, à la vente publique et à l'encanquia été faite des propriétés immobiliêves dépendantes de la succession du dit feu Sieur Henri Metzinger, par suite de la quelle adjudication les Sieurs Laurent Millandon, George Frederick Fave, et Thomas Fergusson, représentans légaux de tous les héritiers du dit Metzinger, leu ont passé vente, par acte authentique au rapport du Sieur Carlile Pollock, un des notaires en cette ville, de la susdite propriétè, le dit actè en date du dix sept Juin, mil huit cent seize.

Et le Sieur Patrick Norris pour avoir acquis du dit Sieur Miller la moitié indivise de la dite propriété, par acte au rapport du même notaire, en date du vingt Juillet suivant.

Et par autre acte au rapport du même notaire sous la date du seize Octobre, mil huit cent seize, il est constaté que le prix total de la dite acquisition a été bién et dumènt payé et que les représentans des dits héritiers Metzinger m'ont donné bonne et finale quittance et pour solde, ainsi que main levée de toute hypothèque.

D'après le certificat du conservateur des hypothèques en cette ville, en date du cinq du courant et rafraichi ce jourd'hui, il n'y a point d'hypothèque inscrite contre les sieurs vendeurs sur la propriété présentement vendue.

La présente vente est faite pour et moyermant la somme de quatre mille huit cent cinquante piastres, que les dits sieurs vendeurs reconnaissent avoir reçu comptant, de la dite corporation, à la vue et en présence des notaire et témoins soussignés, en un mandat tiré par l'honorable maire ès-qualités sur le trésorier de cette ville, ainsi qu'il y est légalement autorisé par la déliberation précitée; et de la quelle somme les dits sieurs vendeurs donnent par les présentes à la dite corporation, ce acceptant pour elle, le dit sieur acquéreur ès-qualités bonne et finale quittance et pour solde du prix de la présente vente.

Et en signe de réélle mise en possession de la susdite propriété les dits sieurs vendeurs ont tout présentement fait remise à la dite corporation, et pour elle an sieur acquéreur ès-qualités: 1° Du titre original de concession, accompagné du plan figuratif, délivré au dit feu Sieur Metzinger, ci-dessus relaté, lequel a été enregestré au griffe du bureau des terres, le dix Septembre, mil huit cent huit, levie trois, page deux cent vingt neuf. 2° Expédition du judgment de la Cour Suprême precité. 3° Expédition de la vente passée au Sieur Miller par les héritiers Metzinger. 4° Expédition de la vente de la moitié de la dite propriété passée par le Sieur Miller au Sieur Norris. 5° Et enfin, expédition de la quittance finale ainsi que de la main levée d'hypothèque données par les héritiers Metzinger; lesquels titres le dit sieur acquéreur ès-qualités, reconnait avoir reçu pour être diposés dans les archives de la dite corporation, et en donne décharge de droit.

Et en outre les dits sieurs vendeurs ont déclaré céder et transporter à la dite corporation, ce acceptant pour elle, le sieur acquéreur ès-qualités, tous

les droits de propriété qu'ils ont ou peuvent avoir sur les terrain, maison, edifices, circonstances et dépendances, présentement vendus, pour par la dite corporation, qui s'en reconnait en bonne et due possession dès ce jour, ainsi que le déclare le dit sieur acquéreur ès-qualités, en jouir, faire et disposer en toute proprieté comme de chose à elle bien et légitimement appartenante et en vertu des présentes.

Fait et passé à la Nouvelle Orléans, en l'etude le sept Mars, mil huit cent dix sept, et la quarante uniême année de l'indépendance Américaine, en présence des Sieurs Felix de Armas et Benoêt Pignon, némoins sur ce requis et domiciliés en cette ville, qui après lecture faite, ont signé avec les parties comparantes et le sieur acquéreur ès-qualités, et le notaire soussigné.

(Signé) AUG. MACARTY, *Maire*,
PATRICK NORRIS,
JOHN F. MILLER,
FELIX DE ARMAS,
B. PIGNON.
MICHEL DE ARMAS, *Not. Pub.*

Pour copie conforme à la minute le trois Juin, mil huit cent trente.
[SEAL.] (Signed) FELIX DE ARMAS.

Document 5.

Pardevant Christoval de Armas notaire public à la résidence de la Nouvelle Orléans, Etat de la Louisiane, Etats Unis d' Amérique, et en présence des témoins ce apris nommés et soussignés:

Fut présent le Sieur Arnaud Magnon, résident en cette ville, lequel a par ces présentes, dit et déclaré que par compromis entre lui et la corporation de la Nouvelle Orléans, représentée par l' honorable Augustin Macarty, maire de la dite ville, en date du neuf Mars, mil huit cent dix neuf, et passé au rapport du notaire soussigné, il s'est engagé à passer vente à la dite corporation, sous la simple garantie de ses faits et promesses et sans aucune autre garantie de sa part, d'un lot de terre de figure irréguliêre à lui appartenant, et situé en cette ville, entre le chemin public et la levée, et entre les rues St. Philippe et des Ursulines, avec tout ce qui dépend du dit terrain et tous droits et prétentions y attachés, à la charge par la corporation de lui payer aux termes et de la maniere mentionnée au dit compromis, le prix qui serait déterminé par quatre arbitres appréciateurs nommes par les parties; que la dite éstimation ayant été faite et ayant par elle été acceptée, le dit Sieur Arnaud Magnon, déclare par ces présentes, vendu, céder, quitter et délaisser, commê de fait il vend, cede, quitte et délaisse, sous la simple garantie de ses faits et promesses et sans aucune autre garantie de sa part, même relativement à la contenue du dit lot de terre, à l'honorable Augustin Macarty, maire de la Nouvelle Orléans, ici présent et acceptant et stipulant pour et au nom de la corporation, ainsi qu' il y est spécialement autorisé par délibérations due conseil de ville, en date du vingt du mois de Mars dernier, dont copie en due forme, demeurera annexée aux présents pour recours.

Un lot de terre de figure irréguliêre à lui appartenant et situé en cette ville, entre le chemin public et la levée, et entre les rues St. Philippe et des Ursulines, avec toutes les bâtisses qui sont construites dessus et tout ce qui en dépend, avec tous droits et prétensions y attachés, auxquels il subroge la

dite corporation et déclare la mettre en son lieu et place sans aucun recours quelconque ni aucune réclamation de sa part contre lui pour quelque cause que ce puisse être à raison tant de la présente subrogation que de la susdite vente; le tout sans en rien excepter ni reserve, et tel qu'il se trouve décrit dans les tîtres dont il est porteur, dûment enregistrés dans le bureau des terres et dont il a fait remise et délivrance à l'honorable Augustin Macarty ès qualités en présence des notaire et témoins soussignés et dont le dit Sieur Macarty donne décharge et se déclare satisfait au nom de la dite corporation.

La présente vente est faite pour la somme de trente-deux mille cinq cents piastres, montant de la susdite éstimation et payable un quart comptant, un quart dans six mois, un quart dans douze mois et un quart dans dix huit mois à partir du jour des présentes, et sous la condition expresse ainsi qu'elle est mentionneé dans le susdit compromis que le sieur vendeur demeurera et habitera la maison principale et les bâtimens collatéraux qui sont sur le dit lot de terre, pendant six mois à dater de ce jour, et ce à titre gratuit et sans aucun dédommagement de sa part; et en conséquence de tout ce que dessus et en paiement du prix de la susdite vente, le dit Sieur Macarty ès qualités a tout présentement fourni au dit Sieur Magnon quatre mandats par lui signés en date de ce jour et tirés sur le trésorier de la ville, payables à l'ordu du dit Sieur Magnon, et chacun de la somme de huit mille cent vingt cinq piatres le premier payable à vue, le second à six mois, le troisième à douze mois et le quatrième à dix huit mois de date, lesquels quatre mandats ont été acceptés par le dit sieur vendeur qui les a retirés pardevers lui et qui payés que soient les dits mandats donne par les présentes à la dite corporation, bonne et finale quittance du prix de la présente vente.

Au moyen de ce que dessus, et sous la pleine et entiere exécution de la réserve de jouissance que s'est faite le dit sieur vendeur pour un laps de tems de six mois, ce dernier cède et transporte à la dite corporation, representée comme dit est, tous les droits de propriété et autres droits et prétentions, qu'il a ou peut avoir sur le dit lot de terre désigné aux présentes pour par la dite corporation en faire, jouir et disposer, comme de chose à elle appartenante bien et légitimement en vertu des présentes.

L'honorable Augustin Macarty és-qualité déclarant renoncer dès à présent et pour toujours au nom et pour la dite corporation à tous recours et toutes réclamations quelconques, contre le dit Sieur Magnon, pour quelque cause que ce puisse être, qui pourraît naître, tant en raison de la susdite vente que de la cession de tous ses droits et prétentions, qu'y fait le dit sieur vendeur qui de son côté fait la même renonciation en faveur de la dite corporation ce qui a été réciproquement acceptie par les parties contractantes: à ce faire fût présente et est intervenue dame Henriette Roche, épousé du Sieur Arnaud Magnon et de lui dûment assistée et autorisée, à l'effet des présentes, laquelle dite Dame après avoir pris lecture et communication de tout ce que dessus a dit et déclaré qu'étant bien informée du droit qu'elle a sur le lot de terre présentement vendu par son époux à la corporation de cette ville représentée comme dit est, elle entend consentir à la dite vente comme lui étant agréable et renonce à tous droits d'hypothèque et autres qu'elle pourrait y avoir, surquoi le Notaire soussigné en présence de stémonis aussi soussignés a déclaré à la dite dame Magnon qu'avant de recevoir son consentement et sa renonciation, il croit devoir la prévenir que par les lois de cet Etat elle a une hypothèque tacite sur tous les biens de son mari et même sur ceux de la communanté en cas de renonciation à icelle; 1°. Pour la restitution de sa dol et

pour le remploi des biens dotaux qu'elle aurait apportés en mariage. 2°. Pour le remploi et la restitution des biens dotaux par elle acquis durant le mariage, par successions on donation; 3°. Pour l'indemnité des dettes qu'elle aurait contractées ou qu'elle contracterait avec son mari, ainsi que pour le remploi de ses biens propres qui serieant aliénés; 4°. Pour ceux de ses biens paraphernaux, dont son mari aurait en l'administration on la jouissance; 5°. Et enfin pour les donations à cause de noces qu'elle aurait pu recevoir de son mari et qu'en donnant son consentement à la présente vente faite par ce dernier et en faisant la renonciation qu'elle se propose, elle se prive à jamais et irrévocablement de tous droits de revenir contre la dite vente, soit pour cause d'hypothèque ou de privilége, soit autrement; sur quoi la dite Dame Magnon a déclaré, toujours autorisée comme dit est, persister dans la même volonté qu'elle a manifestée, et à cet effet elle a déclaré, comme elle déclare par ces présentés, consentir expressément à la dite vente et à tout ce qui pent en être la suite comme le tout lui étant agréable; se desaissant de tout droits d'hypothèque, de privilège et autres qu'elle a on pourrait avoir sur le susdit lot de terre vendu par son mari; soit à titre de dot, de donation, à cause de noces on autrement, y renoncer formellement par ces présentes dès maintenant et à toujours, et donnant en outre, tous pouvoirs à la dite corporation, représentée comme dit est, de s'aider des dits droits tant en jugement que hors, comme de chose à elle appartenante; et elle promet et s'oblige tant en son nom, qu'en celui de ses héritiers on ayant cause, envers la dite corporation, ce acceptant pour elle, le dit Sieur Macarty ès-qualités qu'elle tiendra toujours pour valides la dite vente faite par son mari, ainsi que la présente renonciation, qu'elle fait aux droits qu'elle a on aurait sur le dit lot de terre, mentionné aux présentes; qu'elle ni que personne autre en son nom, ne reviendra jamais contre icelle de quelque manière que ce soit et qu'elle renonce à tous droits, privilèges, lois et coutumes dont elle pourrait s'appuyer on qui pourrait être en sa faveur contre la dite corporation, pour raison de ce qui est dit ci-dessus.

D'Après le certificat du conservateur des hypothèques en cette ville, en date de ce jour, il n'y a aucune hypothèque inscrite contre le dit Sieur Magnon, sur le lot de terre qui fait l'objet de la présente vente.

Car ainsi, &c., promettant, obligeant, renonçant, &c.

Dont Acte: Fait et passé à la la Nouvelle Orléans, en l'Etude, en présence des Sieurs Benoît Pignon and Alphonse Robin tous deux témoins requis et domiciliés en cette ville, ce septième jour du mois d'Avril de l'année mil huit cent dix neuf, la quarante troisiéme anneé de l'Indépendance Américaine et ont les dites parties, signé aux présentes avec les dits Notaire et témoins aprés lecture faîte.

(Signé) ARNAULD MAGNON,
HENRIETTE ROCHE,
F. MAGNON,
AUG. MACARTY, *Maire*,
BT. PIGNON,
A. ROBIN,
CHRISTOVAL DE ARMAS, *Not. Pub.*

[SEAL.] Pour copie conforme à l'original déposé en mon Etude pour recours, Nouvelle Orléans le cinq Mars, mil huit cent trente-deux.

(Signé) OCTAVE DE ARMAS, *Not. Pub.*

Document 8.

Par devant Adolphe Mazureau, notaire public, dûment commissionné pour la ville et paroise de la Nouvelle Orléans, y résidant et en présence des témoins ci-après nominés et soussignés.

Sont comparus François Mederic Crozat et Adélaïde Taquino, son épouse, de lui dûment autorisée à l'effet des présentes, demeurant en cette ville, lesquels ont dit et déclaré avoir reçu des avant ces présentes des maires et deniers de Messrs. Christoval Guillaume de Armas et Manuel Simon Cucullu, domiciliés en cette ville et ici présens, la somme de treize cents trente trois piastres trente-trois cents pour la part et portion de la dite Adélaïde Taquino dans le prix de la vente faite aux dits Sieurs De Armas et Cucullu, par Manuel Bertrand, Joseph Bertrand, Joseph Taquino, Iréne Taquino, femme de Maximilien Portal et la dite Adélaïde Taquino, authoriseé de son curateur ad bona, par acte devant Wm. Christy, notaire public en cette ville en date du six Mai dernie d'un certain emplacement ou terrein situé en cette susdite ville entre la levee et la rue de la levee mesurant une superficie de trois mille cent soixante seize pieds quatre poncés; lequel emplacement appartenait aux vendeurs comme héritiers de feu Thomas Bertrand et Catherine Gonzales leurs perè et mère, grand perè et grand mère.

La dite somme de treize cents trente trois piastres et trente trois cents est resteé entre les mains des dits Sieurs de Armas et Cucullu; quoique quittance de la totalité du prix de leur acquisition leur fût donnée par le dit acte de vente par convention particulière entre eux et la dite Adelaïde Taquino pour lui être comptée soit à sa majorité soit lorsqu'elle se marierait, à la charge par elle d'en donner quand elle lui serait remise et comptée bonne et valable quittance et de ratifier la susdite vente en ce qui la concerne.

Et attendu qu'il est ci-dessus dit; la susdite somme de treize cents trente trois piastres, trente trois cents, a depuis lors été payeé au dit François Méderic Crozat et à la dite Adélaide Taquino, son épouse, par les dits Sieurs Christoval Guillaume de Armas et Manuel Simon Cucullu le dit Sieur François Méderic Crozat et la dite Adélaïde Taquino, son épouse, de lui dûment autorisée déclarent donner aux dits Sieurs de Armas et Cucullu ici présens et acceptant quittance et décharge pleines et entieres de la dite somme, déclarant en outre la dite Adélaïde Taquino autorisée par son dit mari Sr. François Méderic Crozat, qu'au moyen du dit paiement elle ratifie, approuve et confirme des ce moment et à toujours en faveur des dits Sieurs Christoval Guillaume de Armas et Manuel Simon Cucullu, leurs héritiers et ayant cause la vente du dit emplacement ou terrain, telle qu'elle est faite par le susdit acte du six Mai dernier devant William Christy, notaire public, voulant qu'en ce qui concerne la dite Adélaïde Taquino; le dit acte de vente porte à jamais son plein et entier effet; dont acte.

Fait et passie à la Nouvelle Orléans en l'Etude le seize Octobre mil huit cent trente, la cinquante cinquiême année de l'Indépendance Américaine, en présence de Henry Laroche, et Alphonse Morel, témoins qui ont signé avec les parties comparantes et le notaire soussigné après lecture faite.

La minute est signée ADELAIDE TAQUINO,
F. M. CROZAT,
CHRISTOVAL G. DE ARMAS,
M. S. CUCULLU,
HENRY LAROCHE,
A. MOREL,
A. MAZUREAU, *Not. Pub.*

[SEAL.] Pour copié conforme Nouvelle Orléans, ce 5 Mars, 1832.
(Signed) A. MAZUREAU, *Not. Pub.*

Document 9.

Par devant Christoval de Armas, notaire public à la résidence de la Nouvelle Orléans état de la Louisiane, Etats-Unis d'Amérique et en présence des témoins ci après nommis et soussignés.

Furent présents l'honorable Augustin Macarty demeurant en cette ville, stipulant au présent acte, comme maire de la ville de la Nouvelle Orléans et comme spécialement autorisé par déliberations de la dite ville sous la date du quartre du présent mois, dont copie en due forme demeurera annexée aux présentes pour recours, d'une part.

Et le Sieur Arnaud Magnon propriétaire demeurant en cette ville, d'autre part.

Il a été dit par les parties comparantes que sur la demande qui a été faite par l'honorable Augustin Macarty en sa qualité d'acquéri et d'acheter pour et dans l'intérêt public, du dit Sieur Arnaud Magnon, un lot de terre dont ce dernier est le propriétaire et qui est situé en cette ville entre le chemin public et la levée et entre les rues St. Philippe et des Ursulines, le dit Sieur Magnon a consenti de vendu le dit lot de terre, avec tout ce qui en dépend et avec tous droits y attachés, à la dite corporation de la ville de la Nouvelle Orléans, sur le prix d'une juste et équitable éstimation; ce qui étant acceptée par le dit Sieur Augustin Macarty en sa dite qualité, il a été fait et établi entre les parties contractantes les conditions suivantes: pour déterminer le mode d'éstimation du dit let de terre et les conditions de la vente qui en sera faite par le dit Sieur Arnaud Magnon au dit Sieur Augustin Macarty en sa qualité, d'après l'éstimation qui sera établie.

Article premier.

Le lot de terre qui a été désigné sera éstimé et apprécié dans sa valeur actuelle; avec tous bâtimens et bâtisses qu' il comporte, par quatre personnes à ce connaisseurs dont deux d'entr'elles seront désignées et présentées par Mr. Macarty ès-qualités, et les deux autres par le Sieur Arnaud Magnon, propriétaire du dit lot de terre, lesquels arbitres dans le cas où ils ne pourraient s'accorder entr'eux dans la majorité de leur opinion, sont dés ce moment autorisés à convenir du choix d'un cinquiême arbitre, á tître de sur arbitre, qu'ils appelleront auprés d'eux pour obtenir cette majorité d'opinion; l'obligation de ces arbitres sera d'établir leur éstimation d'après la considération des termes de paiement que le Sr. Magnon consent d'accorder à la corporation de la ville pour le prix de la dite propriété qui sont un quart comptant, un quart dans six mois, un quart dans douze mois et le dernier quart dans dix huit mois.

Article second.

En exécution du premier article, l'honorable maire nomme et présente pour deux arbitres au nom de la corporation de la ville M. M. François Duplessis pére et Thomas Urquhart, propriétaires en cette ville, et Mr. Arnaud Magnon nomme et présente au même tître M. M. Joseph Guillot et Louis Gossuron, aussi propriétaires, déclarant l'un et l'autre conferér aux dit arbitres les pouvoirs et primes dans et par le premier article.

Article trois.

Le devoir des arbitres sera de procéder à l'éstimation du prix du lit lot de terre aussitôt que faire se pourra et dans un délai qui ne pourra excéder quinze jours.

Article quatre.

Les parties contractantes promettent et s'obligent de considérer l'éstimation du prix du dit lot de terre par les arbitres nommés, comme devant servir et déterminer celui pour lequel le dit Sieur Arnaud Magnon consent de vendu et vendra le dit lot de terre à la corporation de la ville, sous la condition et avec les reserves ci-après déterminées.

Article cinq.

La somme qui sera déterminée pour le prix éstimé du dit lot de terre sera exigible et payable un quart comptant, un quart dans six mois, un quart dans douze mois, et le dernier quart dans dix huit mois, à compter du jour de la passation de l'acte.

Article six.

Le dit Sieur Arnaud Magnon en passant l'acte de vente se réservera la faculté de demeurer et d'habiter la maison principale et bâtimens collatéraux que comporte le dit lot de terre, pendant six mois, à dater du jour de la vente et ce à titre gratuit et sans aucun de dommagement de sa part.

Article sept.

Le Sieur Arnaud Magnon promet et s'oblige de vendre avec la garantie de ses faits personnels seulement et sur la représentation des titres dont il est porteur qu'il représentera et dont la corporation de la ville après avoir pris communication, se reconnaîtra satisfaite.

Article huit.

A la première réquisition d'une des parties contractantes et sur la représentation du procès verbal d'estimation ou d'une copie d'icelui dûment certifiée par les éstimateurs ou la majorité d'entre'eux l'honorable Augustin Macarty en sa qualité et le dit Sieur Arnaud Magnon promettent et s'obligent de passer l'acte authentique de vente et d'acquisition du dit lot de terre sur les bases établies et sur le prix d'éstimation qui sera déterminé par les arbîtres, consentant l'un et l'autre à défaut d'exécution de la présente convention par l'un d'entr'eux, d'être contraint à son exécution sur la simple représentation d'une expédition du présent acte comme exprimant une réille promesse de vente.

Car ainsi, &c., promettant, obligeant, renonçant, &c., dont acte.

Fait et passé à la Nouvelle Orléans, en l'Etude le neuf Mars, de l'année mil huit cent dix neuf et la quarante troisième de l'Indépendance Américaine, en présence des Sieurs Alphonse Robin et Benoît Pignon, témoins

sur ce requis exprés, connus et domiciliés en cette ville qui après lecture faite ont signé avec toutes le parties et le notaire soussigné.

(Signé) ARNAUD MAGNON,
AUG. MACARTY, *Maire*,
A. ROBIN,
BENOIT PIGNON.
[SEAL.] CHRISTOVAL DE ARMAS, *Not. Pub.*

Pour copie conforme à l'original déposé en mon etude pour recours. Nouvelle Orléans, le six Mars, mil huit cent trente deux.

(Signed) OCTAVE DE ARMAS, *Not. Pub.*

Document 10.

Extrait du second Registre des Actes de Baptêmes des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 26, No. 123.

No. 123.—*Rosalia Beltran.*

"En la Yglesia Parroql. de Sn. Louis de la ciudad del Neuvo Orleans en veinte y quatro dias del mes de Marzo de año de mil setecientos ochenta y siete. Yo el infra firmado teniente de curode dhá Parroqa. cantice solemnemte y puse los santos oleos segun veto de Nra. Mr. la Santa Yglesia a una nina de color blanco, que nacio el dia veinte y siete del mes de Febrero de este presente año a quien puse por nombre Rosalia hija legitima de Thomas Beltran y de Catalina Gonzales, fueron sus Padrinos Jaime. Badid y Margarita Folar; y para qe. conste lo firme dhó dia mes y año ut supra."

(Signé) FR. JOSEF DE XEREZ.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Document 11.

Extrait du second Registre des Actes de Baptêmes des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 335, No. 1,368.

No. 1,368.—*Manuel Antonio Beltran.*

"Viernes dia siete de Noviembre de mil setecientos noventa y quatro yo el infra escrito Missionl. cappno. y Theniente de la Parroql. de Sn. Luis de esta ciudad de la Nueva Orleans cantice solemnente. con las ceremonias ql. usa la S. R. Yglesia á un niño en siete de Agosto y se le duron los nombres de Manuel Antonio hijo legitimo de Thomas Beltran natural de Binifato, Reyno de Valencia y Catalina Gonzales, Natural de Guimes en la Ysla Canaria, abuelos paternos de dho niño Thomas Beltran y Margarita Frances, naturales del d'ho Binifato, y maternos Josef Gonzales y Josefa Ortêga Naturales del ingenio cerca de Guimes en la Ysla Canaria fueron sus Padrinos, Antonio Gonzales, y Rosa de Cuevas a quienes adverti el parentesco y obligaciones y para qe. const. la firma en el dia mes y ano arriba expresados."

(Signé) FR. FIRSO DE PELEA GONZALES.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Document 12.

Extrait du troisième Registre des Actes des Baptêmes des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 81, verso No. 542.

No. 542.—*Josef Benito Beltran y Gonzales.*

"Dia veinte y cinco de Febrero, de este año mil setecientos noventa y nueve: Yo, Fr. Flavian Religo. Capucho. y teniente de cura del sagracio de la Yglesia Cathedral de la ciudad de la Na. Orléans cantice y puse los S. Ss. Oleos à un niño que nacio en el dos de Febrero, de este año hijo legitimo de Dn. Thomas Beltran natural de Bonifalo en España y de Da. Catalina Gonzales, abuelos paternos Dn. Thomas Beltran y Da. Margarita Frances, maternos Dn. Fulgentio Gonzales y Da. Josefa Ortega en el qual nino exerci las sacras ceremonias y preces y le puse por nombre Joseph Benito fueron sus padrinos Dn. Benito Cavo y Da. Maria Martha aquienes adverti el parentesco espiritual y para que corte lo firme."

(Signé) FS. FLAVIAN DE BESANCON.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.
L. MONI, *Curé.*

Document 13.

Extrait du quatriême Registre des Actes des Baptêmes de Blanc de l'Eglise Cathédrale et Pároissiale de St. Lous de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 101, verso No. 624.

No. 624.—*Joseph Landry Taquino y Gonzales.*

"Dia catorce de Julio de este año de mil ochocientos y cinco: Yo Fr. Antonio de Sedella Religioso capuchino cura de esta Yglesia Parroql. de San Luis de Nueva Orleans, cantice y puse los Stos. oleos á un niño que nacio el dia dies de Junio proximo pasado hijo legitimo de Joseph Taquino naturale de Genova y de Rosalia Beltran, natural de esta feligresia y ambos vecinos de ella; abuelos paternos Geronimo Taquino y Clara Hermosa abuelos maternos Thomas Beltran y Catalina Gonzales en el qual nino exercilas sacras ceremonios y preces y le puse por nombre Joseph Landry, fueron sus Padrinos Antonio Herez, y Maria Fou ; a quienes adverti el parentesco espiritual y para que conste la firme."

(Signé) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orleans, le 7 Mars, 1832.
(Signed) L. MONI, *Curé.*

Document 14.

Extrait du cinquiéme Registre des Actes de Baptêmes des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 174, verso 719.

No. 719.—*Irenee Felice Taquino y Bertran.*

"Dia veinte y seis de Enero de este año de mil ochocientos y nueve, yo el infra firmado theniente de cura de esta Yglesia parroquial de San Luis de

Nueva Orleans, cantice y puse los santos oleos à una niña que nacio el dia veinte y dos de Deciembre del año proximo pasado de mil ochocientos y ocho hija ligitima de Jose Taquino natural de Geneva y de Rosalia Beltran natural de esta feligresia abuelos paternos Heronimo Taquino y Clara Hermosa; abuelos maternos Thomas Beltran y Catharina Gonzales; en la qual niña exerci las sacras ceremonias y preces y le puse por nombre Irenee Felice fueron sus padrinos Dn. Domingo Gonzales y Da. Francisca Suarez, à quienes adverti el parentesco espiritual y para que conste lo firme.

(Signé) P. KONNE.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signé) L. MONI, *Curé.*

Document 15.

Extrait du sixieme Registre des Actes de Baptêmes des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 92, No. 318.

No. 318.—*Cathalina Taquino y Beltran.*

" Dia quatro de Septiembre de este año de mil ochocientos y dies: Yo, Fr. Antonio de Sedella, Religioso Capno., cura de esta Yglesia parroql. de Sn. Luis del Nueva Orleans, cantice y puse los Santos Oleos, à una niña que nacio el dia cinco de Agosto proximo pasado hija legma. de Joseph Taquino, natural de Geneva y de Rosalia Beltran, natural de esto ciudad, y ambos vecinos de ella abuelos paternos, Geromino Taquino y Clara Hermosa, abuelos maternos Thomas Beltran y Catalina Gonzales; en la qual niña exerci las sacras ceremonias, y preces y le puse por nombre Catalina fueron sus padrinos Antonio Beltran tio y la ya referida Catalina Gonzales, abuela materna de la recien cantizada; a quienes adverti el parentesco espiritual, y para que conste lo firme.

(Signè) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Document 16.

Extrait du sixiéme Registre des Actes mortuaires de Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 250, verso No. 136.

Rosalia Beltran y Gonzales, mujer de Joseph Taquino.

" Dia veinte y dos de Dbre. de este año de mil ochocientos y trece: Yo, Fr. Antonio de Sedella, Religioso Capuchino, cura de esta yglesia parroql. de San Louis del Nuevo Orléans, de sepultura en el campo Sto. de la referida Yglesia el cuerpo de Rosalie Beltran, natural y vecina de esta ciudad de edad, como de trienta años, hija legitima de Thomas Beltran, ya tambien defenito y de Catalina Gonzales casada con Joseph Taquino, la qual fallecio à los tres de la mañana de este dia, haviendo recivido los santos sacramentos, de penitencia, Eucaristia y extrema uncion y para que conste lo firme.

(Signé) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Document 17.

Extrait du neuvieme Registre des Actes mortuaires des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 110, No. 517.

No. 517.—*Da. Catharina Gonzales vinda en pas. Nupcias de Thomas Beltran y en 2as. de Domingo Gonzales.*

" Dia veinte y seis de Marzo de este año de mil ochocientos y veinte y seis: Yo, Fr. Antonio de Sedella, Religioso Capuchino, cura de este Yglesia de San Louis de esta ciudad de la Nueva Orléans, de sepultura en el campo santo de la referida Yglesia al cuerpo de la difunta Da. Catharina Gonzales, vecina de esta ciudad de edad como de setenta y quatro años, natural de aquimes en la Ysla de Canaria è hija legitima de Dn. Joseph Fulgention Gonzales y de Da. Josefa Ortega, vinda en primeras nupcias de Dn. Thomas Beltran y en segundas de Dn. Domingo Gonzales, la qual fallecio ayer noche á eso de las onze sin haber recivido los santos sacramentos por haver sido su mueste repentinamente y para que conste lo firme.

(Signé) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.
(Signed) L. MONI, *Curé.*

Defendant's Testimony.

C. G. De Armas and M. S. Cucullu, *vs.* The Mayor, Aldermen, &c. } *Testimony taken in open court, 5th March,* 1832.

It is admitted by plaintiffs that previous to the cession of Louisiana, by France to Spain, there were several sales of lots, made under the French Government, said lots fronting the river, which were sold with the description of "*Face au quai.*"

Joseph Pilié, witness for the defendants, sworn, says that he has resided in the city of New Orleans since 1804, and has been surveyor of the city of New Orleans since the year 1818. Witness knows the lot of ground which is claimed in the present suit by plaintiffs. That if plaintiffs recover said lot, it will cover part of the highway and part of the levee as they now exist. That the levee in front, and the road which runs from said lot, and in that quarter of the city, were altered in the year 1822. That at the time said levee and road were altered, there were no houses or buildings existing on the lot of ground claimed by plaintiffs, or on those claimed by Magnon and Metzinger. Witness recollects of the existence of a house on the lot claimed by plaintiffs; the rear of said house, rested against the base of the levee.

Cross-examined.

Witness is forty-three years of age. Witness being asked if a space equal to that shewn on the plan annexed to plaintiffs' petition, did not exist on the spot indicated on said plan, before the road and levee were altered in 1822, says, that such a space did exist. Witness knows of Mr. Magnon putting

Nueva Orleans, cantice y puse los santos oleos à una niña que nacio el dia veinte y dos de Deciembre del año proximo pasado de mil ochocientos y ocho hija ligitima de Jose Taquino natural de Geneva y de Rosalia Beltran natural de esta feligresia abuelos paternos Heronimo Taquino y Clara Hermosa; abuelos maternos Thomas Beltran y Catharina Gonzales; en la qual niña exerci las sacras ceremonias y preces y le puse por nombre Irenee Felice fueron sus padrinos Dn. Domingo Gonzales y Da. Francisca Suarez, à quienes adverti el parentesco espiritual y para que conste lo firme.

(Signé) P. KONNE.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signé) L. MONI, *Curé.*

Document 15.

Extrait du sixieme Registre des Actes de Baptêmes des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 92, No. 318.

No. 318.—*Cathalina Taquino y Beltran.*

" Dia quatro de Septiembre de este año de mil ochocientos y dies: Yo, Fr. Antonio de Sedella, Religioso Capno., cura de esta Yglesia parroql. de Sn. Luis del Nueva Orleans, cantice y puse los Santos Oleos, à una niña que nacio el dia cinco de Agosto proximo pasado hija legma. de Joseph Taquino, natural de Geneva y de Rosalia Beltran, natural de esto ciudad, y ambos vecinos de ella abuelos paternos, Geromino Taquino y Clara Hermosa, abuelos maternos Thomas Beltran y Catalina Gonzales; en la qual niña exerci las sacras ceremonias, y preces y le puse por nombre Catalina fueron sus padrinos Antonio Beltran tio y la ya referida Catalina Gonzales, abuela materna de la recien cantizada; a quienes adverti el parentesco espiritual, y para que conste lo firme.

(Signé) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Document 16.

Extrait du sixiéme Registre des Actes mortuaires de Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 250, verso No. 136.

Rosalia Beltran y Gonzales, mujer de Joseph Taquino.

" Dia veinte y dos de Dbre. de este año de mil ochocientos y trece: Yo, Fr. Antonio de Sedella, Religioso Capuchino, cura de esta yglesia parroql. de San Louis del Nuevo Orléans, de sepultura en el campo Sto. de la referida Yglesia el cuerpo de Rosalie Beltran, natural y vecina de esta ciudad de edad, como de trienta años, hija legitima de Thomas Beltran, ya tambien defenito y de Catalina Gonzales casada con Joseph Taquino, la qual fallecio à los tres de la mañana de este dia, haviendo recivido los santos sacramentos, de penitencia, Eucaristia y extrema uncion y para que conste lo firme.

(Signé) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Document 17.

Extrait du neuvieme Registre des Actes mortuaires des Blancs de l'Eglise Cathédrale et Paroissiale de St. Louis de cette ville de la Nouvelle Orléans, dans l'Etat de la Louisiane, folio 110, No. 517.

No. 517.—*Da. Catharina Gonzales vinda en pas. Nupcias de Thomas Beltran y en 2as. de Domingo Gonzales.*

" Dia veinte y seis de Marzo de este año de mil ochocientos y veinte y seis: Yo, Fr. Antonio de Sedella, Religioso Capuchino, cura de este Yglesia de San Louis de esta ciudad de la Nueva Orléans, de sepultura en el campo santo de la referida Yglesia al cuerpo de la difunta Da. Catharina Gonzales, vecina de esta ciudad de edad como de setenta y quatro años, natural de aquimes en la Ysla de Canaria è hija legitima de Dn. Joseph Fulgention Gonzales y de Da. Josefa Ortega, vinda en primeras nupcias de Dn. Thomas Beltran y en segundas de Dn. Domingo Gonzales, la qual fallecio ayer noche á eso de las onze sin haber recivido los santos sacramentos por haver sido su mueste repentinamente y para que conste lo firme.

(Signé) FR. ANTONIO DE SEDELLA.

Pour copie conforme à l'original. Nouvelle Orléans, le 7 Mars, 1832.

(Signed) L. MONI, *Curé.*

Defendant's Testimony.

C. G. De Armas and M. S. Cucullu, *vs.* The Mayor, Aldermen, &c. } *Testimony taken in open court, 5th March,* 1832.

It is admitted by plaintiffs that previous to the cession of Louisiana, by France to Spain, there were several sales of lots, made under the French Government, said lots fronting the river, which were sold with the description of "*Face au quai.*"

Joseph Pilié, witness for the defendants, sworn, says that he has resided in the city of New Orleans since 1804, and has been surveyor of the city of New Orleans since the year 1818. Witness knows the lot of ground which is claimed in the present suit by plaintiffs. That if plaintiffs recover said lot, it will cover part of the highway and part of the levee as they now exist. That the levee in front, and the road which runs from said lot, and in that quarter of the city, were altered in the year 1822. That at the time said levee and road were altered, there were no houses or buildings existing on the lot of ground claimed by plaintiffs, or on those claimed by Magnon and Metzinger. Witness recollects of the existence of a house on the lot claimed by plaintiffs; the rear of said house, rested against the base of the levee.

Cross-examined.

Witness is forty-three years of age. Witness being asked if a space equal to that shewn on the plan annexed to plaintiffs' petition, did not exist on the spot indicated on said plan, before the road and levee were altered in 1822, says, that such a space did exist. Witness knows of Mr. Magnon putting

repairs and keeping in order the levee in front of his property. Witness cannot say that the house of Bertrand touched the interior steps of the levee; but there was a fence which touched the rear of the levee. Witness does not know whether Mr. Magnon did the whole repairs required on the levee in front of his property.

Principal examination.

That the levee in front of said property, has been repaired and kept up by the corporation, since witness has been city surveyor.

The defendants introduced in evidence, an ordinance of O'Rielly, dated 1770, marked No. (8,) not filed.

The defendants also introduced in evidence, and read the titles by which A. Magnon acquired the property sold by him to the mayor, aldermen, and marked (7) (not filed.)

Afterwards, to wit, on the 6th day of March aforesaid, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, and the following testimony and document A. were filed, to wit:

Order.

C. G. De Armas and M. S. Cucullu, *vs.* The Mayor, Aldermen, &c. } 9,587.

This cause came on again this day for trial before the court.

MAZUREAU, *for Plaintiffs.*
MOREAU, *for Defendants.*

When, after hearing testimony and counsel, it is ordered by the court, that the same be continued till to-morrow.

Testimony.

C. G. De Armas and M. S. Cucullu, *vs.* The Mayor, Aldermen, &c. } *Testimony taken in open court, 6th March*, 1832.

Louis Moreau Gislet, being duly sworn, declares that he was born in Hispaniola in the year 1767, and resided there in different cities of the said Island, as well as in France. That when cities or towns were founded by the king's authority in the French colonies, there was no charter granted or issued for that purpose, but that the said cities or towns were established under the directions which were addressed to that effect, by the minister of Marine and colonies of France, to the governors of the said colonies, who, agreeably to the said instructions, did cause a plan to be made of the said cities or towns, by the king's engineer in chief of the said colonies, whose powers and duties were nearly similar to those which were performed by the surveyor general when Louisiana was under the Spanish Government, or in its defect, by a surveyor chosen to that effect by the said governor; that in drawing the said plan, the said officer generally divided all the spot destined for the city into regular squares or islets, divided by streets with designation of the public squares and buildings, and of the quays of the said

city when it was a port; that the said plan, for its authenticity, was generally signed and dated by the officer who executed the same, the original of which was deposited in the minutes of the said officer where he was the king's engineer in chief of the said colony, who was authorized to deliver copies of the same, one of which was deposited in the archives of the said colony, and the other was sent to France, in order to be deposited in an office attached to the department of Marine and colonies which existed at Versailles, under the title of "Bureau of the Manuscripts of the Charts of the French Colonies." That it was agreeably to the said plan, that all the town lots of the said cities, were granted or sold by the king's agents or administrators of the said colonies, that there exist in France and in its colonies, in all the cities or towns which are situated on the sea shore or on the banks of navigable rivers, a certain vacant space between the sea, shore or the banks of the said rivers, and the first line of the houses of the said cities front to the said sea shore or rivers; that said vacant space is of a certain extent in width greater or lesser, according to the importance of the place or of its commerce. That in Paris the quays are very extensive, and that at Bordeaux where the witness resided during some time, the quays of the said city, are of nearly the same extent in width, which exist between the river Mississippi and the front of the Cathedral church of St. Louis, of New Orleans, and that at Cape Français and Port au Prince, in the Island of Hispaniola, the quays of the said cities were from sixty to 120 French feet front from the sea shore to the first line of houses; that generally the quays in all their extent were left for the public use, but that it was sometime permitted or suffered by the king's government, or by the municipal authorities of the place, to erect some buildings either for public utility or convenience, or ornament of the said city and port, such as market-houses, fountains, coffee-house, and public baths; that in France the quays are made and repaired according to certain laws and regulations made on that subject; that in Hispaniola, they were made and repaired by the owners of the lots and houses fronting the port, and at their expense, and without any indemnity whatsoever; that the police of the said quays, was the subject of municipal regulations; that it was only in the year 1819, that the city council of New Orleans made the discovery of the old plans of this city, and procured copies thereof, which are now produced by them; that in the centre of this city, there is no more space between the bank of the river and the first row of the houses situated between Toulouse and St. Louis streets, than it is necessary for the levee now existing there, and a street of sixty feet in breadth between the said levee and the first row of the said houses; that some time in the year 1813, the soil on which the levee and the street which exist in that part of the city, did threaten to fall down in the river, by what is called here an eboulis, and that the water which went through the said levee, overflowed the street in that part with such an abundance, that fears were entertained that the foundations of the houses in the neighborhood might be perhaps thereby injured, which accident was only prevented by the immense and expensive works which were made by the corporation to consolidate the said levee.

Cross-examined.

Witness was about seventeen or eighteen years of age when he resided in Paris; he resided there about seven years at different periods. Paris is not a sea port; the river is navigable for large boats; the Seine is navigable for

the large boats even above Paris. Witness was at Bordeaux on six different occasions; the longest period he resided there at any one time, was not more than two months; that at Bordeaux the police of the quays is under the direction of the mayor and echevins or aldermen; they exercise this administration under the laws of France. Witness believes there are laws to that effect. Witness being asked, if he has ever seen any law of France which gives the direction and administration of the quays in the sea ports of France to the mayors and echevins of these ports, says, that he knows of no other law except the ordinance of marine with the commentaries of Valin on the same. Witness being asked, if from the ordinance of marine and said commentaries, it appears that the administration of the quays of the sea ports in France is given to the mayors and echevins of said ports, says, that this will appear when said ordinance and commentaries are read. Witness has not been in France since the latter end of 1789. Witness is not certain, but thinks that there was no court of admiralty in Paris. Witness does not know if there was any court of admiralty at Bordeaux, but he supposes there must have been one. There were no mayors or echevins in the Island of St. Domingo; previous to the French revolution, there were courts of admiralty in the sea ports of said Island. Said courts were composed of a judge, named lieutenant judge, Procureur du Roi and a Greffier. That the place where the levee fell in and required such extraordinary repairs as mentioned in his examination in chief, was between Toulouse and St. Louis streets.

Principal examination resumed.

That in St. Domingo, the police of the municipalities, was administered by the judge of the first instance, called Senechal, and as far as witness recollects, there were several police regulations made by the Council of Port au Prince and Cap Français. Witness has never seen or known the courts of admiralty in St. Domingo exercise any police jurisdiction over the quays, when any encroachments were made on the quays and buildings, or otherwise complaints were made to the intendant of the colony, in order to leave these destroyed.

Cross-examination.

That in some of the ports of St. Domingo, there was a person named Maître des quays, whose duty it was to attend to the police of the quays and remove obstructions; there was, besides, witness believes, a captain of the port. That the office of maître de quai was afterwards suppressed. That at St. Domingo, the quays were made and kept up by the front proprietors; these front proprietors received no tonnage duty or wharfage. That there was no maître de quai at Cape Francais, when witness was there in 1788. Witness never saw any of these persons acting in any port of St. Domingo; he has only read in the history of St. Domingo, that such officers once existed at Port au Prince, but had been suppressed. Witness does not know by whom said officers were appointed. Witness quitted St. Domingo for the first time for France when he was about eight years of age. Witness returned in his twentieth year. Witness returned to St. Domingo in the latter end of 1787, and remained a few months, and then returned to France. That the *Conseil Supérieur*, of which he has spoken in St. Domingo, was a tribunal whose duties were strictly judicial, except in matters of police. That the

appeals from the courts of admiralty in St. Domingo to Paris to the court of the admiral called "La cour de la table de Marbre."

E. Mazureau, witness for the plaintiffs, sworn, says, that he was born in Rochelle, in France, in March, 1777; that at the age of thirteen years, when witness left college, he entered the office of a lawyer as his clerk. Shortly after he was employed at the same time as second clerk in the office of the Greffier de l'Amiranté, whose name was Paul Louis Dubreuil. That the judge, called lieutenant judge, was Mr. Harousard; the avocat du Roi was named Mr. Green. The procureur du Roi was named Valin, the grand-son of the author of the commentaries on the ordinance of marine. The receiver of the duties imposed in favor of admiral, was the son of Mr. Valin. That the court of admiralty exercised, that is to say, made all the police regulations for the port of Rochelle, and for all the ports of the Isle of Rhé which were under the jurisdiction of that of Rochelle. That all the quays of the port of Rochelle belonged to individuals; they were allowed to receive, and did receive from all vessels making fast at their quays, certain duties called droits de quayage. Witness has himself received said duties from captains of vessels, and accounted for them to the proprietors of the quays. That the police of the ports and quays and docks, which were called caille, was exercised under the regulations made by the admiralty by the maître de quai, an officer appointed in said port, as well as in all the other ports of France, by the admiral. That there was at Rochelle, a body charged with the administration of the city within the walls, composed of echevins, and presided by a maire. The maire and echevins have never had any jurisdiction even of police, and never made regulations for the police of the port, quays, docks, and by the laws of France, to wit: the ordinance of marine, the court of admiralty had the exclusive jurisdiction of all contracts, and of all crimes and misdemeanors and violations of police regulations, entered into or committed in the port or in the quays or docks.

The defendants introduced in evidence the copy of an act or concession, dated 1st May, 1783, marked A; also the plan of the city of New Orleans, marked B.

It is admitted by the plaintiffs, that since the ordinance of O'Reilly, the mayor and city council have kept up the levee in front of the city of New Orleans in general, and have repaired the same whenever it was found necessary, except in that part of it opposite the lot of Tho. Bertrand.

Document A.

Nous Gouverneur et Commissaire de la Marine, ordonnateur pour le Roy en la Province de la Louisiane, en vertu du pouvoir à nous accordé par sa Majesté, avous sous le bon plaisér du Roy, concédé et accordé, concédous et accordous par ces présentes à perpétuité au Sieur Broutin Ingénieur du Roy, un terrain côté F, sis en cette ville sur le quay, sur lequel il y a une maison ou barraque qui tombe en ruine, contenant dix toises de face sur trente deux toises et demi de longueur tenant à droite au terrain E, appartenant à la succession de feu Sieur André Camerè, à gauche au terrain coté G, appartenant au Sieur Lafreniéré, et par derrierè au terrain No. 21, appartenant à la succession de feu Sieur de Mandeville pour en jouir par lui, ses héritiers et ayant cause comme de chose à lui appartenant aux redevances qui pourraient êtrè établies par sa Majesté pour raison de son domaine et à condition que le dit Sieur Brontin fera défricher le dit terrain, fera batir

dessus et entourer et fera faire autour d'ecelin les et fossés nécessaires pour l'écoulement des eaux à peine de reunion du dit terrein au domaine de sa Majesté en foi de quoi nous avons si'gué ces présentes et à icelles fait apposer le cachet de nos armes et fait contresiguer par nos secretairés. Donné à la Nouvelle Orléans le premier Mai mil sept cent trente trois.

La minute est signée Bienville Salmon, par mond. Sieur Fabry, par mond. Sieur Conturier.

Pour copie conforme à l'original resté en mon etude pour recours, en foi de quoi fai signé le présent et apposé le sceau de mon office, à la Nouvelle Orléans le six de Mars, 1832.

(Signed) LOUIS T. CAIRE, *Not. Pub.*

[SEAL]

Afterwards, to wit, on the seventh day of March aforesaid, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

Order.

C. G. DE ARMAS AND M. S. CUCULLU, *vs.* THE MAYOR, ALDERMEN, &c. } 9,587.

This cause came on again this day for trial before the court.

MAZUREAU, *for Plaintiffs.*
MOREAU, *for Defendants.*

When, after hearing argument of counsel, the court order that this case be laid over for consideration.

Afterwards, to wit, on the twelfth day of March aforesaid, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following judgment was entered on record, to wit:

Judgment.

The plaintiffs allege that the widow Gonzales, from whom they derive title, obtained a grant from the United States of the lot in question, and that the defendants have extended the levee so as to embrace said lot, and conclude with the prayer, that they may be decreed to be the lawful owners, and the defendants enjoined from disturbing them in the free enjoyment of their rights as owners of said lot. The defendants oppose this claim upon several grounds; but the only one which can be relied upon with any hope of success is, that the space betwen the front buildings of the city and the river was at the time the city was laid off under the government of France, intended to be kept open for public use, designated as a *quay*, and which could not be the subject of a grant. If the facts as stated in the answer were true, the conclusion drawn from them would be undeniable. The sovereign could not cede what had been already granted, unless there be retrocession or forfeiture. The only evidence in support of the defendant's claim is a fac simile of a plan made by Charlevoix, and by him stated to be copied from a plan deposited in the marine office, made by *N. B. Ing. de la M.* 1744, and on which is marked, on the space between the front of the city and the river the word "*Quay.*" Names do not change the nature of things; a quay is an artificial work, and may belong to an individual as well

as a corporation; but to belong to either it must not only exist and have a defined extent, but must be shown to have been granted. It is self-evident to every one who has seen this space of ground, that it is not a quay. The defendants have shown no other title which can be validly opposed to the grant under which plaintiffs claim; there is no material difference between this and the case of Metzinger and the defendants; that was a grant under the King of Spain; this is a grant under the United States, who have succeeded to the same rights. Had the defendants sheltered themselves under their charter, and shown that the public safety required that the base of the levee should be extended to prevent inundation, or that it was necessary for a public way, the case might have presented a different aspect.

It is ordered and decreed, that the defendants be enjoined not to disturb the plaintiffs in the possession and free exercise of their rights in and to the lot mentioned and described in their petition, and that the defendants pay costs.

(Signed) JOSHUA LEWIS.

And afterwards, to wit, on the twenty-second day of March, in the year aforesaid, into the court aforesaid, holden as aforesaid, came the defendants by their attorney aforesaid, and filed the following petition of appeal, with the judge's order and bond following on the same, to wit:

Petition of Appeal.

To the honorable the District Court in and for the First Judicial District of the State of Louisiana:

The petition of the Mayor, Aldermen and Inhabitants of the city of New Orleans, humbly sheweth:

That your petitioners think themselves aggrieved by a judgment which was rendered in this honorable court on the 12th instant, in a case in which C. G. De Armas and S. Cucullu were the plaintiffs, and your petitioners the defendants.

And whereas, your petitioners are condemned by the said judgment to deliver to said plaintiffs the possession of a certain lot of ground situated at the foot of the levee of this city, and your petitioners are desirous to supercede the execution of the said judgment,

Your petitioners pray that they may be allowed to appeal from the said judgment to the Supreme Court of this State, on their giving their bond with the security of Denis Prieur, a freeholder of this city, in such a sum as your Honor will be pleased to fix, according to law, to supersede the execution of the said judgment; and as in duty bound your petitioners, &c.

(Signed) MOREAU LISLET, *of Counsel for Petitioners.*

Judge's Order.

An appeal is allowed, returnable on the fourth Monday in next month, provided the appellants shall give security in the sum of one thousand dollars in manner and form as the law requires.

March 22d, 1832.

(Signed) JOSHUA LEWIS.

Bond.

Know all men by these presents, that we, the Mayor, Aldermen, and Inhabitants of the city of New Orleans, and Denis Prieur as security, are held and firmly bound unto Christoval G. de Armas and Manuel Simon Cucullu, their executors, administrators, and assigns, in the sum of one thousand dollars, for the payment whereof, we bind ourselves, our heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated in the city of New Orleans, on this 22d day of March, in the year of our Lord one thousand eight hundred and thirty-two.

Whereas the above bounden Mayor, Aldermen, &c., have this day filed a petition of appeal, for a final judgment rendered against them in the suit of said Armas and Cucullu *vs.* said Mayor, &c., in the first judicial district court of the State of Louisiana, on the 12th day of March, A. D. 1832,

Now the condition of the above obligation is such, that the above bound Mayor, Aldermen, &c., shall prosecute their appeal, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied by the proceeds of the sale of their estate, real or personal, if they be cast in the appeal; otherwise that the said Denis Prieur, surety, shall be liable in their place.

DENIS PRIEUR, *Mayor.* [SEAL.]
DENIS PRIEUR. [SEAL.]

Signed, sealed, and delivered in presence of
J. L. LEWIS.

STATE OF LOUISIANA, *First Judicial District Court.*

I hereby certify the foregoing forty-eight pages to contain a transcript of the record in the case of C. G. de Armas and M. S. Cucullu *vs.* the Mayor, Aldermen, and Inhabitants of the city of New Orleans, No. 9,587 of the docket of this court, and all the evidence adduced by the parties on the trial of the cause with the exception of the following documents which were not filed; grant by the Baron Carondelet to Fr. Liotan, dated 14th June, 1792; the titles of A. Magnon to the property sold by him to the city; the ordinance of O'Reilly, dated 1770; plan of the city of New Orleans, marked B.

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed the seal of said court, in the city of New Orleans, on this thirteenth day of April, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifty-sixth year of the independence of the United States.

(Signed) JNO. L. LEWIS, *Clk.*

I hereby certify that the foregoing transcript of the record of the case therein mentioned, contains all the evidence on which the same was tried in the first instance, with the exception mentioned in the clerk's certificate.

(Signed) JOSHUA LEWIS.

On the back is written as follows, to wit: 2,320. First judicial district court. Christoval G. de Armas and Manuel Simon Cucullu, appellees, *vs.* the Mayor, Aldermen, &c., of the city of New Orleans, appellants. Appeal. Mazurean for apellees. Morean and Eustis for appellants. I ac-

knowledge the service hereof. Mazureau for appellees. Supreme court, filed April 16th, 1832.

N. B. LE BRETON, *Clk.*

Be it remembered, that on the 30th of April, in the year of our Lord one thousand eight hundred and thirty-two, into the Supreme Court for the eastern district of the State of Louisiana, holden in the city of New Orleans, came the Mayor, Aldermen, &c., by Geo. Eustis, esq., their attorney, and made the following motion, to wit:

MONDAY, *April 30th*, 1832.

The court met: Present the honorable GEO. MATHEWS.
" the honorable F. X. MARTIN.
" the honorable ALEX. PORTER.

CHRISTOVAL G. DE ARMAS AND ML. SON. CUCULLU, appellees, *vs.* THE MAYOR, ALDERMEN, AND INHABITANTS of New Orleans, appellants. } 2,320.

On motion of Geo. Eustis, esq., of counsel for defendants, it is ordered that this cause be called by preference on Monday next, and be fixed for trial, provided that no objection be made thereto at bar.

Be it remembered, that on the 7th of May, of the year aforesaid, into the Court aforesaid, holden as aforesaid, the case of De Armas and Cucullu *vs.* the Corporation of New Orleans, was ordered to be fixed for trial for the 15th of said month, on motion of George Eustis, esq., of counsel for the defendants.

Afterwards, to wit, on the 15th day of May, in the year aforesaid, into the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

CHRISTOVAL G. DE ARMAS AND M. S. CUCULLU, appellees, *vs.* MAYOR, ALDERMEN, AND INHABITANTS of the city of New Orleans, appellants. } 2,320.

This case was this day called for trial, and the arguments having lasted till the end of the sitting of this day, were ordered to be continued until to-morrow.

Afterwards, to wit, on the 16th day of May aforesaid, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

C. G. DE ARMAS AND M. SON. CUCULLU, appellees, *vs.* MAYOR, ALDERMEN, &c., of New Orleans, appellants. } 2,320.

The arguments in this case were this day resumed, and having lasted till the end of the sitting of this day were ordered to be continued until Monday next.

Afterwards, to wit, on Monday the 21st day of May aforesaid, in the year aforesaid, at a session of the Court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

C. G. DE ARMAS AND M. S. CUCULLU, appellees,
vs.
MAYOR, ALDERMEN, &c., of New Orleans, appellants. } 2,320.

The arguments in this case were again resumed, and having lasted till the end of the sitting of the day, were ordered to be continued until to-morrow.

And afterwards, to wit, on Tuesday the 22d day of May aforesaid, in the year aforesaid, at a session of the Court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

C. G. DE ARMAS AND M. S. CUCULLU, appellees,
vs.
MAYOR, ALDERMAN, &c. of N. Orleans, appellants. } 2,320.

The arguments in this case were this day resumed and closed; whereupon the Court took time to consider of their decree.

Afterwards, to wit, on Monday 11th day of February, in the year of our Lord one thousand eight hundred and thirty-three, at a session of the Court aforesaid, holden as aforesaid, the Court delivered their opinion seriatim, in writing, in the words and figures following, to wit:

C. G. DE ARMAS AND M. S. CUCULLU, appellees,
vs.
THE MAYOR, ALDERMEN, &c., of the city of New Orleans, appellants. } 2,320. *Appeal from the First Judicial District Court.*

Martin J: The defendants are appellants from a judgment of the Court of the first district, by which the plaintiffs have recovered a lot of ground in the city of New Orleans. Their counsel has, in my opinion, justly called this the most important cause which has ever been presented to the consideration of this Court. The tract of land, or slip of ground, on the legal character of which we have to pronounce, and of which the *locus in quo* constitutes a very inconsiderable part, covering the whole space in front of this flourishing city, which separates the first row of houses from the levee along the Mississippi.

The counsel of the appellees contends, that the whole of this ground is vacant or waste land, unappropriated, as yet, to any particular use, and liable to be disposed of by the United States, on gratuitous or onerous alienation; the people of this State having, as a condition of an earlier admission into the Union, renounced their rights to the vacant or unappropriated lands in Louisiana in favor of the United States.

The counsel of the appellants have, on the contrary, contended that this whole space is their property. Secondly, that it is a *locus publicus* dedicated to the quadruple purpose of the pleasure and comfort of the public; the convenience of commerce in lading and unlading merchandise; the continuation through the city along the levee of the high-way, (which on the whole island on which the city stands,) runs on the banks of the river; and of a public street along the front row of houses. The counsel has further urged, that if the United States ever had any right or title to the premises, it has never been legally transferred to the appellees.

As, in my opinion, the appellees have shown no legal title, or right of property in the premises, I have not considered the first plea.

The only question, therefore, which we are called on to solve, relate, First, to the legal character of the premises: Secondly, the validity of the transfer under which the appellees ground their title.

1. On the first point, the appellants offered in evidence: First, a manuscript copy of a plan of the city, subscribed by Dupauger.

2. A like copy of a plan which is now in print, and engraved on the large map of the city lately published by Francis B. Ogden; the date of the original plan is May 15th, 1728, and purports to be subscribed by Broutin, an engineer, whose signature is authenticated by several superior officers.

3. A printed copy of the *of the* city, in Charlevoix's history of New France.

The two manuscript copies are admitted to have been made on the original plans preserved in an office of the department of colonial affairs, at Versailles, in which plans of towns, fortifications, &c., were deposited.

The signature of Dupauger is neither proven nor admitted, but his official capacity is admitted. Charlevoix, in his history of New France, informs us there was an engineer of a high grade of that name in Louisiana, who made and showed him a plan of the city. When we compare all these plans with the existing state of the city; the number, width, length and bearing of the streets; the number and size of the squares and lots, the actual *loci publici*, they establish by the *evidentia rei* the correctness of the original plans on which these two copies were made.

There is no difference between these plans and that preserved by Charlevoix, except that the latter has but four of the front streets parallel to the river, while the former has seven. Hence the counsel for the appellees has contended, that no reliance can safely be placed on the evidence resulting from these plans. He assumes, that the date of the latter is in the year 1744; that being the period of the publication of Charlevoix, at least of the edition produced in Court. Whatever be the date of the copy, it is clear the original, from which it was taken, appears to be of a date not much less ancient than the two other plans. In Charlevoix's copy, the residence of the Ursuline nuns is marked at the north corner of Chartres and Bienville streets; and the new convent appears as an unfinished building at the eastern corner of Condé and Ursuline streets.

The editor of the Lettres Edifiantes, has preserved the copy of one from father Petit, the provincial superior of the Jesuits in Louisiana, giving an account of the Natchez massacre; and of the charity and hospitality of the nuns in regard to distressed persons of their sex from that part of the province, who escaped from that disaster; and he says the holy sisters deplored the restraint imposed on their hospitality, by the circumstance of their new house *below* the city, not being as yet fit for their reception. The presumption is strong that this did not long continue to be the case, and that the plan of which Charlevoix had a copy, was made before their removal. The circumstance of the latter plan having but four streets parallel to the river, while the former had seven, shows manifestly that the one exhibited the intended, and the other the actual, state of the city.

All these plans, however, agree as to the portion of the city now under our consideration; that fronting the river. In all of them, the space which separates the front of the lots from the levee or embankment, which protects the city against the overflow of the Mississippi, is designated by the word *quai*, written on the plans from those two objects at places equi-distant.

The counsel for the appellants has argued, that this evidently shows what would otherwise appear from a view or examination of the whole plan, viz: that this space was designated by the founder of the city to be appropriated to the use, not only of the inhabitants of the city, but that of those of other parts of the State and even strangers: that this designation sufficed to render the spot a *locus publicus*, or public place; to the use of which the public became entitled, without any grant from the sovereign, as the public cannot have a representative capable of accepting the grant.

This principle is shown to have undergone discussion, and received considerable illustration in the Supreme Court of the United States at its last term, in the case of the *City of Cincinnati* vs. *White's lessee.* 6 *Peters.*

The defendant in that case, had succeeded to the rights of the original owner of the land, (on which the city of Cincinnati now stands,) who had made a plan of that city, on which the ground lying between Front street and the Ohio, was set apart as a common, for the use and benefit of the town. In his said capacity, the defendant claimed a portion of the ground included in this space. The Supreme Court held, "that the right of the public to use this space, must rest on the same principles as that of using the streets and highways. That dedications of land for public purposes had frequently come under the consideration of the Court, and the objections which had generally been raised against their validity had been the want of a grantee competent to take the title, as well as a grantor to give it. But that was not the light in which the Court had considered such dedication to public uses. The law applies to it those rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor, and to secure to the public the benefit held out and expected to be derived from and enjoyed by the dedication. That there was no particular form or ceremony necessary in the dedication of land to public uses, and that all that was required was the assent of the owner of the land, and the fact of its being used for the public purpose intended by the appropriation.

"That all dedications of land to public use must be considered with regard to the use for which they were made; and streets in a town or city may require a more enlarged right over the use of the land, in order to carry into effect the purposes intended, than may be necessary in an appropriation for a highway in the country; but the principle, so far as regards the right of the original owner to disturb the use, must rest on the same ground in both cases; and applies equally to the dedication of the common as to the streets. It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati, and doubtless greatly enhanced the value of the private property adjoining the common, and thereby compensated the owners for the land thrown out as public grounds.

"After being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an *estoppel in pais*, which precludes the original owner from revoking such dedication. It would be a violation of good faith to the public, and to those who have acquired private property, with a view to the enjoyment of the use thus publicly granted it."

A similar decision is shown to have been made in the highest Spanish tribunal in Louisiana in 1798. Gravier had laid out his plantation adjoining New Orleans into a faubourg, in the plan of which he had designated a spot as a public square, and disposed of several lots accordingly. His heir,

imagining that as no deed had been given for this square, it still constituted part of the estate; he therefore began to erect buildings on it. His pretensions were opposed, and by a decree which intervened it was ordered that the square should be left free for the public use, and that the buildings he had begun to erect should be demolished. See *Mayor et al. vs. Gravier*, 11 *Mart.* 625.

The counsel for the appellees has relied on several propositions. I have examined them most minutely, on account of the impression they appear to have made on the majority of the court.

1. The first is, that the space which the appellants' counsel and the plans of the city call a quay, *is not* a quay, but is formed by nature; while quays are works of man. That on rivers and in cities, they are the levees; in the sea-ports, the shores of the sea are called *quays*.

He has referred us to *Feraud's and De Verger's Dictionaries*; *Traité de la Police de Paris*, 97, 98, 99, 102; *Lois de St. Domingue, vol.* 2, 725; 3 *Ibid.*, 447, 763; 4 *Ibid.*, 771, 791; 5 *Idem*, 473, 651; 6 *Idem*, 58, 290, 526, 528, 568.

Feraud says, a quay is a levee made between the river or water of a port, and the houses, for the convenience of the highway, and to guard against the overflow or high water.

De Verger says, it is a large sloping wall built on piles and raised along the river, to keep the ground from caving in, and to prevent the overflow. In a city it is a levee between the river and the houses, for the commodiousness of the highway; the shores of a sea-port which serve for lading and unlading merchandise.

In the *Traité de la Police de Paris*, at the places to which reference is made, I have not been able to find any thing tending to the elucidation of this proposition. I have, however, considered all the quotations in the examination of the ninth proposition.

In the Laws of *St. Domingue, vol. 2d*, is an ordinance authorizing an individual to make before his house a *quay* and a *chaussée*, leaving before the house a vacant space of one hundred and fifty feet, guarding the *chaussée* by a double row of picquets.

In vol. 3., p. 477, I find nothing but an ordinance directing a quay to be kept clear and unincumbered. In the same vol., page 675, a quay is directed to be built ninety feet in width. In vol. 4th, p. 771, another quay is ordered to be built one hundred and twenty feet in width. In p. 791, of the same vol., the importance of a quay for the city of Port au Prince, is spoken of. It is to be spacious and commodious, for the use and comfort of the public, and is to be filled up and levelled. In vol. 5th, p. 473, a quay for the city of the Cape, is projected for the comfort of the city, and the convenience of commerce. A space is to be left before the houses for military evolutions. In the same volume, page 651, a quay for another city is mentioned. It is said a wide space is indispensable between the houses and the river, as the want of it may, in the case of conflagration facilitate the spreading of the flames.

I find nothing in the 6th volume, that throws any light on this part of the case, except a permission granted by one of the Governors of *St. Domingo, par grace*, out of commisseration, to erect on the quay a frame building thirty or forty feet square, under the charge of demolishing it on the first order, without claim to any indemnification; ibid, 528.

I have risen from the examination of these authorities cited in support of

the proposition, with the impression that they do not establish it, but rather the converse. I entered on the examination with the supposition that the word quay, is particularly applicable to that part of a port, (on the sea or river,) which is used for the reception of merchandise imported, or to be exported; and this impression has neither been effaced or weakened.

In the *Dictionnaire de Trevoux*, we have the following definition of the word quay: In marine phrase, it is a space on the shore of a port for the loading and unloading of goods; *agger ad ripam.*

In the *Dictionnaire de l'Académie*, edition of 1798, it is said, we call a quay a shore of a seaport, which serves for the lading and unlading of merchandise. There is in ports an officer called *Maître du Quai*, who has charge of the police of the port.

Boiste, in his *Dictionnaire*, edition of 1829, defines a port to be a place for the reception of vessels, in which they are protected from storms. He understands, also, by the same word, *a place* on the shore of the sea, or on the bank of a river, where they unload merchandise. Thus far lexicographers. But courts of justice are warned by law not to adhere to the strict grammatical sense of words, but seek their popular. In the first quotation from the laws of St. Domingue, a *chaussée* and a *quai* are spoken of as two distinct objects; the former meaning the one immediately on the water, against the attrition of which it is to be protected by a double row of picquets. The quay, by which I understood the place destined for the reception of merchandise, is to be between the *chaussée* and the open space of one hundred and fifty feet, which is to be left open between it and the first row of houses. I take *levée* and *chaussée* to be synonimous terms.

Chaussée, a levee of earth which is made along the stream to retain the water of a river or pond. A levee which is made in low, wet and swampy places, to serve as a road or way: to make a *chaussée* in a swamp. *Dictionnaire de l'Académie Francaise.*

Levée, a mass of earth or masonry raised above the ground to form a road and retain the water, to make a levee across a swamp. *Idem.*

The word *quay*, like many others, has several significations. In a strict sense, it may be confined to a sloping wall. In another, to the part of the port destined to the reception of merchandise. In a more enlarged sense it designates the whole space which separates the first row of houses of a city from the sea or river. It is in this last sense that *Malte Brun* applies it to the quay of St. Petersburg, the quay which separates the emperor's winter palace from the river.

"The granite *quay* in front of the emperor's winter palace, *separating it from* the river, and forming part of the magnificent one which I have elsewhere described, and which extends along the southern bank, is wider here than in any other place I have seen. *Edinburgh Review, p.* 412." Notice of works published by Wells and Lilly, Boston, particularly of Malte Brun's Geography.

It is in the same sense that the word *quay* is used in our civil code, 449. "Common property, to the use of which all the inhabitants of a city, and even strangers are entitled in common; such as the streets, the public walks, places *publiques* and the *quais.*"

It is evidently in that sense that Dupauger, in his plan, applies it to the space which separates the first row of houses from the levee, although that space was intended to include a street along the houses; a place destined to the landing of merchandise, and a continuation of the highway or royal

road along the Mississippi; giving to the whole the peculiar appellation of the most prominent part, to wit: a place for the reception of merchandise.

During the discussion, an argument was attempted to be drawn against the conclusion I have adopted, from the very great extent of this vacant space. The city of New Orleans stands on a place before which the Mississippi makes a very great curve; the base line, that of the first lots, was drawn at a distance of about one hundred and fifty feet from the river in the middle of the city, and of about three hundred feet at the extremities above and below. In the middle the space was barely sufficient for the purposes above specified; especially if we compare it with the space directed to be left vacant in cities on the Island of St. Domingo; certainly not to be compared with New Orleans, as to the importance which their destination attaches to them.

The city forms a parallelogram, all the sides of which, with the exception of that towards the water, were completely closed by fortifications; the streets parallel to the river had no issue, but were stopped by the fortifications on each side. Those which are perpendicular were equally closed by fortifications in the rear, (except one of them which had a gate leading to the Bayou road;) the only other issue or outlet was on the space, the nature of which we are considering; so that a grant of the whole of that space to an individual or individuals, would obstruct every avenue to the city, save the small gate way in the rear; thus making New Orleans a large penitentiary. The streets were very narrow, being but forty feet wide, leaving the city with but a single square; the *place d'armes* or *campus Martius*, the property of the sovereign, the two sides of which were covered with barracks, besides a very small square between the Cathedral church and Royal street, which has lately been widened at the expense of the city, and to which, in remembrance of a late venerated pastor, the name of father Antoine's Square has been given. So that the city is without any space but the streets for air, promenade, or the reception of goods or furniture in case of a conflagration, except this *quai*, or open space fronting the river.

Moreau Gislet, a witness examined in the cause, says: "That in all cities or towns situated on the sea shore, or the banks of navigable rivers, a vacant space between the sea shore, or the banks of the river and the first line of houses front to the sea shore or the river. That this space is of a certain extent in width, greater or less, according to the importance of the place or of its commerce. That in Paris the quays are very extensive; and in Bordeaux the quays are nearly of the same extent in width which exists between the river Mississippi, and the front of the Cathedral church, in New Orleans. That at Cape Français and Port au Prince, in the Island of Hispaniola, the quays were from sixty to one hundred and twenty French feet from the sea shore to the first line of houses. That, generally, the quays, in all their extent, were left for the public use; but that it was sometimes permitted, or suffered by the king's Government, or by the municipal authorities of the place, to erect some buildings, either for public utility, or commerce, or ornament, of the city or port; such as market-houses, fountains, coffee-houses, and public baths."

In the city of Natchez, a much larger space was left vacant between the houses and the river, than in New Orleans. The former city being without any authentic plan or evidence that this place had ever been dedicated to public purposes, the justice of Congress came to its aid. By act passed April 21, 1806, the United States ceded all their right to the land lying between

the front street of the city of Natchez, and the Mississippi river, and for ever vested it in the corporation of the city, so as not to affect the legal or equitable claims of individuals, and directed that the said land be neither cultivated nor occupied by buildings, but that it be planted with trees and preserved as a common, for the use, comfort, and health, of the inhabitants of the said city, and all persons who may occasionally resort thither." See Ingersol's Digest. This is clearly making it a *locus publicus*.

When I compare the space that Dupauger calls a quay, and Malte Brun's description of St. Petersburg, with that which Moreau Gislet has given of the quays in Paris and Bordeaux, Cape Français, and Port au Prince, with the ideas that my mind has received from the examination of the laws of St. Domingo, cited by the appellees, I cannot resist the conclusion that Dupauger meant by his plan, to convey the idea of a dedication to public uses of the whole space under consideration. He appears to have considered the levee and quay, as distinct objects, as they are in the laws of St. Domingo, for he writes the word *quai*, twice, at equal distances from the levee and the houses.

A plan, like a literal document, may, on a first view, present ambiguous ideas. In such cases, the lines of the one, and the words of the other, are susceptible of construction and interpretation, according to settled rules, the principal of which is, that every part of each, should have some object, and none absolutely rejected. In the plan before us, the word *quai* is twice written, as evidence of the destination given to a space of ground. If the word had not been used, it appears to me, the space being an open one, in front of the city, to which every street perpendicular to the river leads, the plan would still present the same evidence.

As the appellees claim under the United States, who have succeeded to the rights of Spain and France, they must be *estopped* by the word quay, used by the officer whom the Government of France employed to make the plan.

If the appellees are not *estopped* by the word quay, it appears to me all the streets in the city being perpendicular to the levee leading to this space, and a spot being marked by the plan upon and over the levee opposite to each street, the conviction is irresistible, that the founder of the city intended that space under consideration, to constitute a part of the city and connect it with the river. It has been said, that this connection may exist, by a prolongation of these streets, over that space to the river, and their intersection by the highway along the river, and a street parallel to it along the first houses, will leave angular squares at the disposal of the United States. To this I answer, that this Court is bound to support the dedication to the extent to which it was made, not to that degree which we might deem sufficient. We sit here to carry agreements into effect, as they appear to have been made, and not to model them. If any part of the space was dedicated to the use of the public, the whole was, and no part can be pointed out as excepted from the dedication.

2, 3, 4, and 5. The next four propositions are, that in France, no corporation or community of town or city, could exist without the king's letters patent.

The cities, towns, or villages, had no property or right of use, without title.

Possession was insufficient to acquire commons or right to use to the inhabitants of a city or town, even when it was incorporated.

Under the Spanish Government, towns had no property without title.

It has appeared to me, that neither of these propositions has any bearing on the present case, as I consider the right claimed to resist encroachments on a public place, as a right not particular to the inhabitants of the city as such; nor on any property exclusively their own, but on a public place, to the enjoyment of which they are entitled, not exclusively, but in common with the inhabitants of any part of the State, or even strangers.

In this part of the case it is all important not to confound public places and such places as belong exclusively to a city or town; the first are destined to public and general use, from which no one is excluded. A citizen or inhabitant of any city, town, or parish, and even a stranger or alien, has an equal right to the use of a street, square, the quay, or port, of the city; to the use of part of the sea or river on which the city or town stands, as any one that dwells or owns property therein. The right to use, results from the dedication, not from any supposed necessity which is presumed to exist, that owners of lots should use the streets to reach their dwellings. If that were the case, the streets would be burdened with a servitude in the nature of a right of way or passage; then the use of the streets would be confined to owners of creditor estates; for such is the nature of a servitude. But streets and public squares, as the Supreme Court of the United States has said, are public places free for the use of all.

The places of which a city or town has the exclusive property, and with which it may prevent any interference by other than its inhabitants, are those which it holds by letters patent, grants, purchase, exchange, or donations, or those on which the inhabitants have a right of use. Of the first kind, are the lots on which town houses, jails, and other buildings of this kind, are erected, or to be erected; grounds on which the inhabitants have the right to pasture their cattle, to cut wood, dig for turf, and the like. It is of this kind of places, that the law says that the city or town cannot claim them, or any use of them, without letters patent, or a grant, or deed. In the absence of such a document, the public, *i. e.*, inhabitants of the cities, towns, parishes, not even strangers cannot be prevented from using places within or near a town or city, to which the inhabitants of the city or town may pretend they have en exclusive right.

Of public places the public may claim the use, by exhibiting evidence of a dedication to its profit, by the sovereign, or *pater familias*, without any letters patent, grant or deed.

Of places which are alleged to be the exclusive property of the town or city, or of which the exclusive right to use is claimed, letters patent, a grant, or deed, must be produced, and it is of these, and these alone, that the authorities relied on by the counsel of the appellees, speak.

6th. The sixth proposition is, that in France the king could dispose of the public places. The authorities relied on in support of this, are Maxims du droit Français, 1 and 2. Vattel, sect. 261.

The first maxim is, that the king of France holds his kingdom from God and his sword.

The second: *si vent le roi, si vent la loi:* as the king wills, so wills the law. *Quoe vult rex fieri sanctoe sunt consonoe legi.*

Neither of these maxims shed any light on the point under consideration. They only shew that the king possesses the legislative power.

The section in Vattel, is as follows: "The nation having the free disposal of all the property belonging to it, (sec. 257,) it may convey this right

to the sovereign, and consequently confer upon him that of alienating and mortgaging the public property. But this right not being necessary to the conductor of the State, to enable him to render the people happy by his Government, it has not made an express law for that purpose; it ought to be maintained, that the prince is not invested with it."

The preceding section may throw some light on the one now under consideration. It is as follows:

"Section 260. The prince or superior of the society, whatever he is, being naturally no more than an administrator, and not the proprietor of the State, his authority as sovereign or the head of the nation, does not, of itself, give him a right to alienate or dispose of the public property. The general rule is, that the superior cannot dispose of the public property as to its substance. If the superior transfers public property, the alienation will be invalid, and may, at any time, be revoked by his successor, or by the nation. This is the law commonly received in France, and it was upon this principle that the Duke of Sully advised Henry IV. to resume the possession of the domain of the crown, alienated by his predecessors."

I have been at a loss to discover how the counsel of the appellees expected us to apply his quotations to the support of his proposition. They seem to shew that the king of France could not sell the domain of the crown. But we are inquiring as to his power to sell *public places*. As to them, the authorities now placed before us afford no light. Those I have had recourse to, establish the converse of the proposition. They shew such places are inalienable, and out of commerce of individuals.

Domat says, rivers, their banks, highways, are public places, which are for the use of all, according to the laws of the country. They belong to no individual, and are out of commerce; the king only regulates the use of them.

We class among public places, as out of commerce, those which are for the use of the inhabitants of a city, or other place, and in which no individual can have any right of property, as the walls, ditches, or gates, of a city and public squares. *Domat, vol.* 2, *lib.* 1, *tit.* 8, *sec.* 2, 3, *and* 16.

This author names, as not included in the domain of the king, public places, as highways, squares, and the like, which are out of the commerce of individuals and devoted to the use of the public. For they produce no revenue, and are not reckoned among objects of property; and the rights which the public and the sovereign have therein, are of another nature than those which property gives.

As it is not alleged that the king of France alienated any part of the space under consideration, I have been unable to discover the bearing of this proposition.

The Spanish laws having been substituted to those of France, by O'Reilly, the Spanish monarch's conduct, in regard to public places, must be regulated by the latter, and not the former. A desire, however, that nothing to which the counsel appears to attach any importance should remain unnoticed, has led me to the examination of this proposition.

7. The seventh proposition is, that the king of Spain might dispose of streets and public places.

In support of this proposition we are referred to *Partida* 3*d*, *tit.* 32, *law* 3, which is in the following words: "If a man begin to erect a new edifice in the public places or streets, or common threshing grounds of any place, without the permission of the king or the council upon whose ground he builds it, then any one of the inhabitants may forbid him to continue the work, &c."

The counsel appears to assume that the power allowing the erection of a building, includes the right of alienating the ground. This is certainly a *non sequitur*. We have seen that public places are inalienable, even by the sovereign, although he has the authority to regulate the use of them; and that this regulation is sometimes effected by grant and permission to erect buildings for the utility or ornament of the city.

The counsel for the appellants has drawn our attention to the gloss on the *Partida*, cited, which states that the permission cannot be granted, either by the king or the council, unless the building be for the ornament of the city.

But if the quotation of the counsel for the appellees does not support his pretension, the counsel for the appellants has furnished us one which establishes the converse. It is found in Partida 5th, 5, 15, which says, "a public place, as squares, roads, threshing grounds, rivers and other waters, which belong to the king or the commons of a city, cannot be sold or alienated."

8. The eighth position is, that in France, quays could be built upon, were susceptible of ownership by individuals, and the king could dispose of them as he pleased.

The authorities cited in support of it, are 2 Valin, 453, 468, *Traité de la Police de Paris*, 88, 97, 98, *and* 99. *Valin* has published an ordinance regulating the duties of the *Maître du quai*, of Dunkirk. This officer is directed, on his evening round, to cause to be shut up *les petites Maisonnettes*, which are on the quays, for the sale of brandy and other articles, so that no body may shelter himself there at night, and to prevent new ones from being built without permission.

By an ordinance of Larochelle, which Valin has given, it is enjoined on keepers of *hotels* and *cabarets*, vendors of tobacco, cider, beer, and brandy, having houses on the quays to shut them at night; they are forbidden to receive or permit any one to go out before daylight in the morning.

In page 98, of the *Traité de la Police de Paris*, it is said, Louis the young, by his letters patent, in the year one thousand one hundred and forty-five, granted to the inhabitants of *Grêvé* and *Monceau St. Gervais*, in consideration of the sum of seventy livres, the grand square, one of the ancient markets of Paris, to be for ever free of any buildings of the king, or other incumbrances.

The author adduces these letters patent as a circumstance to establish the fact, that as early as that king's reign, the Faubourg St. Denis was built, and Grêvé square was a public place and an ancient market.

The counsel for the appellants has urged, that these letters patent establish only that the king undertook, for a given sum, to clear the square of a building which he had thereon. In pages 97, 98, and 99, the counsel for the appellees shows that the king ordered buildings to be erected on the quays of the Island of the Palace, and those of Notre-Dame, the quay Malaqêuts and the arsenal.

The first Island derives its name from the *Palais du Tournelles*, which the kings had on it. This palace was in part demolished under Charles IX, the brother of Henry III. who preceded Henry IV. on the throne of France. The author informs us, that in the beginning of this monarch's reign, this Island was covered with meadows; that the king had it drained, a magnificent square and elegant streets laid out, and he covered its quays with houses. As the Island was the property of the crown, his doing so was certainly no interference with any public place. See pages 97, 98.

By his order similar improvements were made on the other Island, which was the property of the Chapter of the Cathedral of Paris. But we are informed he appointed commissioners to purchase the property of the Island from the Chapter to whom a compensation was made therefor. *See page* 99.

The same observations that were made as to the Island du Palais, apply to the Island Notre Dame, after the latter became the king's property by purchase.

The quay Malaquêts was also built upon. If that quay was a public place in the city of Paris, the king regulated its use by granting permission to erect houses on some part of it, and the convenience, (if any,) was compensated by a rent paid to the city. As to the quay of the arsenal, the author informs us that it was built in one thousand six hundred and four, and that several noblemen made their residence there; this, in my opinion, establishes the period at which buildings were extended to that part of the city. We should understand, by being told that a particular street was built upon, that the houses were built *not on it*, but *along it*.

The ordinance of the marine directs the Wharfinger, when he makes his evening tour, to cause to be shut, *les petites maisonnettes*, the very small houses, which are on the *quay* and *dykes*, in which refreshments and spirits are sold, and that none may retire in them at night, nor to suffer any new houses to be erected without permission.

This ordinance is relied on by the appellees' counsel to prove that quays are susceptible of private ownership, since they may be built upon. My mind has, from the reading of the ordinance, received the impression that it establishes the converse of the proposition. The small houses in which spirits and refreshments were sold, I take to be booths, sheds, &c., not designed for the habitation of man, but for the sale of refreshments, as the wharfinger must see that they be closed at night, so that no one (which includes the owner) may hide himself within them. He is to take care that no such house be built without permission. This implies that the soil is not susceptible of private ownership, for if it was, it could be built upon by the owner without permission.

A quay, like any other public place, is not susceptible of ownership by individuals. But on it, as we have seen, and as is the case with all other public places, certain buildings may be erected for ornament or public utility, without the permission of the prince who regulates the use of them, or of those to whom he delegates or confides this part of his authority. If the quays be at such a distance from the houses in the city, to which sailors and people working on them may conveniently resort for refreshment, it is the province of him who regulates the use of the quays as public places, to determine whether some small portion of ground may not conveniently be set apart on which small buildings may be erected temporarily for that purpose, in such a manner that the public may be better accommodated by the appropriation of the ground covered by such very small houses for a place of refreshments, than by being left open.

The counsel for the appellees has next drawn our attention to an injunction in the ordinance to keepers of hotels, cabirets, and sellers of tobacco and spirits, having houses on the quays, to shut them at night; and forbidding them to receive or suffer any one to go out therefrom during the night. Art. 15, p. 268.

This part of the ordinance does not establish that there is any hotel or cabiret on the quay, but that there are keepers of these houses who have been permit-

ted to occupy them on the quay in the manner just considered and spoken of. The idea of hotels being built not *along* the quay, but *upon* the very quay itself, is as absurd as that of a hotel keeper who is forbidden to receive travellers or boarders after sun down, or to suffer any one of his own servants to go out before sunrise.

The counsel for the appellees, with the view to establish that quays form part of the *petit domaine*, which the king may alienate, has drawn our attention to an edict of 1708, in which he conceives quays are included as constituting a part of that domain. The words of the edict are: "*les droits sur les rivierès navigables, leurs, fonds, lits, cords, quais,*" &c., literally meaning the *right to duties* on navigable rivers, their beds, banks, quays, &c.

The edict, according to my understanding, points out as objects constituting part of the *petit domaine*, the *right of duties*, which the king claims on a navigable river, its bottom, bed and banks, or in a quay, not the *substance* of the river or the quay. O'Reilly transferred to the city the right of claiming an anchorage duty on vessels lying in the Mississippi before New Orleans, but not the river itself.

The right of demanding *quayage* or wharfage on vessels lying along the quay, or on merchandize landed and lodged on the quay, is a right which may be the object of a sale without the quay itself being sold.

The ownership of quays in Larochelle, has been attempted to be established by the testimony of Mazureau. This gentleman, who is a native of that city, says, the quays belonged to individuals. They are allowed to receive, and did receive *droits du quaiage, i. e.* wharfage duties from all vessels making fast to the quays.

In an ordinance of the judge of the admiralty of Larochelle, owners of quays, *propriétaires des quais*, are spoken of as well as in Valin's notes thereon. Notwithstanding all this, my researches have led me to the conclusion, that quays in that city are public places, *hors du commerce*, and not susceptible of ownership by individuals; but that the king ceded his wharfage duties, which *Merlin* informs us, are alienable to certain individuals on the condition that they keep the quays in repair. I think it is of these owners of wharfage duties, that the witness, the judge of the admiralty, and Valin, mean to speak under the appellation of proprietors of quays.

I have been led to this conclusion by the fact, that owners of quays are not known to the law, but owners of wharfage duties are, and on the following considerations:

The ordinance Valin comments on, mentions that quays are to be kept in repair by the municipal authorities. Article 20. That in ports in which individuals are appointed to receive wharfage duties, *they*, and not the municipality, are to keep the quays in repair. *Art.* 21, 2 *Valin*, 475.

Valin never speaks of the obligation of owners of quays to keep them in repair, nor of their right to claim wharfage. Indeed, the obligation cannot be well supposed to exist; for ownership consists in the right of *útendi et abutendi;* and of putting a price at pleasure on the use of it by others. Valin tells us, that in the port of Larochelle, the wharfage duties belong to those who keep the quays in repair. *Ibid*, 473.

The ordinance of the judge who uses the expression of *owners of quays*, purports to be made for preventing extortion in the collection of wharfage duty. And Valin uses the same expression in examining the consequences of those people of their neglect in keeping the quays in repair. The con-

sequence is, the suspension of the right to receive wharfage duties by the *owners of quays*, until they amount to a sum sufficient to pay for the repairs. He examines what is to be done if the quays are suffered to be much out of repair, so that the replacing them in the situation to be used, exceed in value the duties that may be collected during one or more years, and he concludes that proceedings must be instituted to have them condemned, to effect the repairs under penalty of the forfeiture of the right to the wharfage duty in favor of the municipality on whom the obligation thus devolves of keeping the wharves in repair.

These individuals have not the absolute property of the quays, but a qualified one; *i. e.* the right of receiving wharfage duty as a compensation for their care and expense in keeping the quays in repair, having been substituted to the rights of the sovereign, who, in undertaking to keep a public place in repair, has regulated the use of it in such a manner as to subject those who avail themselves of the quays, to contribute to their repair. I consider quays as part of a port. Every dictionary states, that in sea-ports the quay is the place where merchandize is landed. Some state it is the same in ports on a river. We have seen the police of quays in France belongs to the admiralty; the only good reason for this is, that the jurisdiction of the admiralty extends over ports; and of these the quays are a part.

A port consists, not only of the land covered with water on which vessels ride at anchor, but also of dry land, on which merchandises are landed and brought to be shipped. *Mare publicum est, flumina et portus publici sunt.*

The sea, the rivers and ports, are public; if there be not some place out of the sea or river which is the port or part of the port, wherefore are we told that the sea, rivers and *ports* are public? If the port be included in the sea or river, why, after being told that the whole, *i. e.* the sea and river are public, do they tells us that the *port*, a part of these, is so?

9. The ninth proposition is, that the space called the *quay* has ever been considered a part of the king's domain.

In this part of the case, we have been referred to grants of land on that space by Governor Miro to Magnon and Metzinger; by Governor Carondelet to Lioteau, and to the land regulations published by the Intendant in 1799.

But two of these grants have been brought under the consideration of this Court; that to Metzinger, and the one to Lioteau.

In the first, the present appellants failed in the proof of their principal allegation, viz: That the *locus in quo* was part of a public highway. But this Court, of which I had not then the honor of being a member, fully recognized the inability of public places, as was contended for by the appellants. There was not then in the State any copy of the plan of New Orleans, and the now appellants were unable to establish their case. The Court however declared, "that public places, such as roads and streets, cannot be appropriated to private use; that this was one of those principles of public law which required not the support of much argument, that there was not any doubt, that if by a stretch of arbitrary power the preceding Government had given away such places to individuals, such grants might be declared void." 3 *Martin*, 296, 303.

In Lioteau's case, the then plaintiffs labored under the inability to establish the appropriation to the public use by the founder of the city of New

Orleans, of the space which separates the first row of houses from the Mississippi. *See the case of Chabot vs. Blanc*, 5 *Martin*.

The appellants stated their ability to establish, that immediately after the grant, murmurs had been excited, and the inalienability of any part of the space having been tenaciously insisted on, the Governor had revoked his grant and indemnified the grantee, by the concession of a lot on one of the streets; but the Court decided the testimony was inadmissible, and the witnesses were not heard.

Magnon was a ship-builder, and the ship-yard was between the levee and the water. The Governor deeming the builder's residence near it necessary to the public service, allotted him a space of ground to live on near the yard, but on the opposite side of the levee. The question arising out of this grant was not litigated; the city agreeing to compensate Magnon for the relinquishment of his claim.

In 1799 the disposition of the public lands in Louisiana was confided to the Intendant. Morales, the then incumbent, made certain regulations; by one of which he required the claimants of lots before the city to apply for the perfection of their titles. This renewed the murmurs and excitement which the grants of the former Governor had created. The matter was brought before the Cabildo, on the remonstrance of the Attorney General Syndic. That body was then presided by the only jurisconsult in the province, Don Nicholas Maria Vidal, auditor of war and lieutenant-governor, the vacancy in the office of governor by the death of Governor Gayoso, not having as yet been filled. This tribunal directed the Attorney General Syndic to institute legal proceedings to prevent any title or grant being given for any part of the land between the city and the river. The Intendant was no legal character, the assessor of the intendency, his official adviser, had lately died, and no successor had as yet been appointed. These circumstances induced him to decline acting then on the Attorney General Syndic's application. The Cabildo addressed the King on this subject, but the retrocession of Louisiana to France happening soon after, the matter was never acted upon by the sovereign or any of his officers in the province.

It is not pretended that any act of the French government while France possessed Louisiana, nor of the Spanish under O'Reilly and Unzaga, shows that the space of ground, the character of which is the subject of inquiry, was considered a part of the king's domain.

During that period, however, the meat, fish and vegetable markets were removed from Condé street to the space under consideration, under a provision of one of the laws of *la Recopilacion de las Leyes de las Indias*, which requires all markets to be placed in cities and towns on the sea or a river between the houses and the water, a measure resorted to for insuring cleanliness. This was an act regulating the use of a public place, and it contributed to the profits of the city, by whom the space covered by the old markets was converted into a ball-room, and continued so till very lately, when it was sold.

The levee running between the highway and the river was a great thoroughfare, and of much resort. Sailors spread on it, especially on Sundays, their small adventures; pedlars displayed, on tables and under moveable shelters, a variety of wares. Galvez, about the year 1798–9, conceived the idea of relieving the latter from the daily trouble of removing their wares, tables and shelters, by permitting huts and cabins to be erected along the

levee, on the ground where the highway or royal road ran, on condition that those who availed themselves of this permission should pay therefor an annual rent, the produce of which was given to the nuns for the education and support of a number of indigent or orphan girls of the city. This was certainly the legitimate exercise of the authority of regulating the use of a *public place*. In 1788 a tremendous conflagration having almost reduced the city to ashes, some of the poorer classes of inhabitants being left without houses or shelter, Miro, their governor, allowed a number of them to build cabins or huts near those of the pedlars. The ancestor of the vendors of the appellees was one of them.

Gayoso permitted similar buildings to be erected, requiring those who raised them to pay a certain rent, the proceeds of which he applied to the payment of the wages of the door-keeper of the Cabildo.

Of those who availed themselves of Galvez, Miro and Gayoso's permission, it does not appear that a single one, except the vendor of the appellees, ever considered the permission he obtained as entitling him to a claim to the ground on which he built. They viewed their licenses as temporary ones, and when disinclined to pay rent, they removed their light edifices, and cleared the ground which they temporarily occupied.

10. The tenth and last proposition is, that the appellees derive their title to the premises from the United States, under the treaty of cession.

By the second article of that treaty, "all public lots and squares, &c.," are included in the cession. Public squares are thereby nominatively included among the things sold. Hence the appellee's counsel concludes they were the legal objects of sale and alienation. This, in my opinion, does not follow.

The fifth Partida 5, 15, tells us that "a free man, a thing religious, sacred or holy, *a public place*, as square in a city, &c., cannot be sold or alienated; but says, there are cases in which they may; as, where a village or any other place, is sold with all its dependencies." "For though the church in the village could not be separately sold, yet by selling the village it would pass with all other things," and the sale would be valid. But, I understand that the new proprietor of the village would have no more right to the church, or anything belonging thereto. That the church would pass *cum onere*. It would continue to be a place sacred, religious and holy, *hors de commerce*, inalienable as it was in the hands of the former owner or proprietor. Thus highways, streets, squares, ports and public places in Louisiana, passed by the retrocession to France and by her sale, to the United States, because the property of the former, as component parts of the province. Yet their legal character was not changed, and they remained in the hands of the new owner, public things, *hors de commerce*, inalienable as they were before the sale and transfer; the transferee acquiring no other right thereon than that which the transferor possessed; *i. e.* that of regulating the use.

The other observations of the counsel of the appellees, on this proposition, relate to the validity of the transfer of the premises by the United States to the vendors of the appellees, which forms the second branch of my inquiry, to be considered hereafter.

Upon the whole, it appears to me, that the appellee's counsel has failed to establish any of the propositions he relied on, which have any bearing on this case, viz:

1st. That the space marked on the plan as separating the first row of houses in the city, is not a *quay*.

2d. That the King of Spain could alienate public places.

3d. That in France quays were susceptible of ownership by individuals; and the King could dispose of them as he thought fit.

4th. That under the Spanish Government, the space between the houses and the river in this city, was considered part of the royal domain; or, that the treaty of cession supports the appellees claim.

I therefore conclude, that the decision of this part of the case must be governed by that of the Supreme Court of the United States in the case of the *City of Cincinnati vs. White's lessee*, 6 *Peters*, to which the appellant's counsel has referred us.

The applicability of that decision to this case has, however, been contested on the ground that, although it affords evidence of the principles on which it was determined, being consonant to the common law of England, they cannot be received as evidence of this conformity to our law. I have looked in vain in the opinion of the court, for a reference or allusion to any principle peculiar to the common law of England. It has appeared to me that the case was determined on the first broad and general principles of law mentioned in the *Corpus Juris Civilis*, viz. *Honeste vivere*, "to act honestly;" from which is deduced the maxim of *polliciti servare fidem*, "when we have made a promise, to keep it;" and the necessary corollary *turpe est fidem fallere*, "it is shameful to disappoint expectations we have authorized."

But the consonance of the decision with the laws of Spain, is manifest by its conformity to that of the highest judicial tribunal in Louisiana, declared two years before the retrocession to France.

A farther distinction has been attempted to be made between the case in Peters, and the present. In the one, the plan of the city of Cincinnati had been made by an individual, in the other, the plan of New Orleans was made by the sovereign, who, it is said, always retains the power and authority of regulating the use of public places, must at all times retain that of re-modelling his plan of a city, provided he does not interfere with the rights of individuals, nor those which he has sanctioned by a charter or letters patent. This is not denied, in cases of a regulation of the use of public things. But a destruction of the right, and a regulation of the use of it, are very different things; and the former cannot be justified under the pretence of the latter, where the act has none of the characteristics of one tending to regulate, and its object is evidently the destruction of the right.

That the Spanish governor was not considered, in Louisiana, to possess the power of alienating public places, appears to have been the opinion of the Cabildos, of Vidal, the auditor of war, and the officer whom the King of Spain had chosen to furnish his governor with legal advice; and we have seen this opinion was declared to be that of this court in Metzinger's case.

There is so little affinity between the regulation of the use which the public is entitled to make of a public place, and the absolute and gratuitous destruction of the right of using it, that I cannot well comprehend how the authority or right to destroy, is a consequence of that to regulate. Why have the Spanish monarchs announced in the Partidas, that they cannot sell or alienate a street, or public place or square, if the mere alienation by them, has the effect of an instantaneous abolition of the legal character of

such places, in order to create, *ipso facto*, a removal of the place from the class of those which are inalienable, in order to prevent the legal prohibition from presenting an obstacle to the gratification of the sovereign caprice?

I do not wish to be understood to say, that natural or other events may not render a public place no longer susceptible of the use to which it was dedicated; nor that, when this is the case it does not lose the legal character which the dedication and consequent use had given it. Aigues-Mortes, a town of France, remarkable as that from which St. Louis sailed with a large army for the holy land, during the wars of the crusades, is now at the distance of several leagues from the sea. Its ports and quays cannot be used for the purposes to which they were once destined, and have necessarily lost the legal character which their destination and consequent use had given them. This has been the effect of a natural event. The town of Bath, on Tar river, in North Carolina, was erected by the legislative authority very early in the last century, towards the middle of which it had risen to some importance, and the colonial Legislature sat there. The great width of the river before it, rendered the anchorage unsafe; other circumstances combined to induce the inhabitants to remove higher up on the river, to a spot which, during the last war, became the town of Washington, the establishment of which was sanctioned by the Legislature, who ordered the public buildings of the county to be built, and its court to sit there. Before the end of the century, a conflagration destroyed almost every building remaining in Bath, and soon after the act under which the town had been established was repealed, the heirs of the man on whose land the town had been laid off, having repurchased all the lots. Thus, by another than a natural event, the port, quays, streets and public squares of Bath, shared the fate of the port and quays of Aigues-Mortes; *i. e.* they lost the legal character they had by their destination to public uses, their consequent inalienability, and resumed their primitive susceptibility of ownership by individuals. I mean to say, that the liability of a public place to such or a similar change, is not inconsistent with the legal character which its dedication and consequent use imprinted on it, nor the inability of the sovereign to destroy that character, *ad nutum*.

In the present part of my opinion I think it might, however, be conceded, that the authority to alienate may be deduced as a corollary from that to regulate; because it appears to me in this case, there was no alienation of the premises by a sovereign authorized to regulate the use of the public place.

Miro, in yielding to the solicitation of an indigent individual, who desired to be permitted to build himself a small cabin, in which he might keep from the weather the few clothes the late conflagration had spared, did not imagine he was alienating any part of the public places! If he meant to do so, we have the declaration of this court that it would not require much argument to convince them that they should disregard the grant of a Spanish governor of a part of a public place. When, about four or five years afterwards, the few planks which had been nailed together, and constituted his *pequéna cabana* had rotted, and Bertrand found it necessary to rebuild it, he did not conceive himself authorized to do so by the permission he had first obtained to build, without having this permission renewed: and the governor was so conscious of his authority to refuse his consent to a renewal, that he burthened it with the condition that the new work should

not extend beyond the limits of the former. Why this caution, if the former permission was an alienation of the soil?

If the first permission was not an alienation, there is no reason to say the second was.

In one thousand eight hundred and twelve, the second house or cabin had fallen to ruin. The materials were carried away, and this spot of ground left clear.

In that year the Territory of Orleans was erected into a member of the confederacy of the United States; and the new State became the sovereign, on whom devolved the authority to regulate the manner in which the use of public places was to be governed. It is useless to argue, whether until then the Territorial Government, or that of the United States, possessed this regulating power, as no use of it was made by either of them.

If the law be as declared by the Supreme Court of the United States in the *Cincinnati case*, and of the Spanish tribunal in the case of the *Mayor, &c. vs. Gravier*, in relation to the public squares in the Faubourg St. Mary, that a plan manifesting the proprietor's intention to appropriate and dedicate a part of his land to public uses, is sufficient to affix thereto the legal character of a public place; the appellants have shown such plan: the appellees, who contend that an alienation of a public place by the sovereign, divests it of its legal character, and transfers the property to the grantee, have shown no such alienation before Louisiana became a State.

As the new State acquired the capacity to regulate the use of public things within its limits, the United States, if ever they had it, lost it; and any posterior alienation by them of such a place in Louisiana, could not change its legal character.

I conclude, therefore, that the space under consideration, appearing by the plan of the city of New Orleans to have been appropriated to the use of the public, and having been ever occupied as such, although in two instances Governors favored individuals with grants of part of it, this Court ought to say the *locus in quo* is part of a public place, *hors de commerce*, and cannot be claimed by an individual in a civil action.

As it is my misfortune to differ in this respect from the opinion of a majority of this Court, it becomes my duty to examine the validity of the transfer of the premises by the United States, to the vendor of the appellees.

It is best to begin this examination by bringing once more to view some of the principal facts; they are as follows:

The ancestor of the vendors of the appellees, in one thousand seven hundred and eighty-eight, presented a petition to Governor Miro, stating that the house he theretofore lived in having been destroyed in the conflagration of the city of New Orleans, he found himself without a shelter, and was desirous of building a small house opposite to Mr. Bienvenu, and solicited the Governor's permission to do so, which was granted.

Six years afterwards he presented another petition to the succeeding Governor, Carondelet, stating that his small house or cabin (*cabána casitá*) was rotten, and the roof so decayed that he was exposed to the loss of the few clothes he and his family had. He prayed permission to rebuild it. This was also granted; but on the condition that the dimensions of the new house should not exceed those of the old.

In 1809, the applicant having died, his widow laid her claim before the land commissioners of the United States, for a confirmation of title to what

she called *a lot* of ground. The board state, that in their opinion, they were without authority to make any decision in the case, but expressed their belief that if Congress affirmed the claim, it would be rather an act of justice than of generosity.

In 1812, the house being in a state of great decay, the materials of it were taken down and removed, and the ground cleared.

In 1821, the patent under which the present claim is grounded, was issued by the President of the United States.

In 1830, the appellees purchased the title of the widow and heirs, and in 1831, the present suit was instituted.

The counsel for the appellants has contended, that the patent under which the appellees claim, is null and void; because it issued without authority, and it can have no legal effect or force under the laws, in pursuance of which it purports to have been issued. He has urged, that the acts of Congress, to which the patent refers, do not relate to *urban* estates, or to lots in a city or town; that in the land laws of the United States, the word *land* has a definite and technical meaning, confined to *rural* estates. That when the laws are to be extended to *urban* estates, it is expressly and particularly done; and he has referred us to the act of Congress for extending the time of payment to purchasers of public lands, in which, after granting this indulgence to purchasers, Congress then makes a provision expressly for allowing the like time and privileges to purchasers of city and town lots. He has said, that throughout the land laws, it appears that whenever an act is intended to operate on *urban* as well as *rural* estates, an express provision is always made therefor. *See land laws*, 860, 736, 788. He has added, that the provisions of the acts of Congress, in regard to surveying and cultivating lands, show that city and town lots were not in the contemplation of Congress.

The opinion of the Executive of the United States, it has been contended, conclusively appears to have been from the period which followed the passage of the acts under consideration, that the land commissioners of the United States had no authority to pass on titles to city and town lots; such being the construction given to them by Mr. Gallatin, then at the head of the treasury department of the United States; instructions which evidently regulated the conduct of the land commissioners, by whom the appellees assert that their title was confirmed.

A decision of the Supreme Court, found in 12 Wheaton, 587, is invoked, in which it was determined that an authority to enter land did not include town lots; the literal meaning of the terms of the act being limited and restrained by the context; and the considerations arising out of the general system of the land laws of the United States.

2d. That the act of 1818, confirms no claims to lands which are not embraced in the report of the commissioners; *i. e.* officially acted and reported on.

3d. It relates only to land claimed under an incomplete French or Spanish grant or concession, warrant or order of survey; whereas, in the present case, no such document ever existed; such a document must contain a special location, or allude to one.

4th. It has been contended, that by the erection of Louisiana into a sovereign State, the United States ceased to be the *parens patriæ*, the sovereign to whom belongs the right of regulating the use of *public places*.

The patent appears to be issued on the confirmation of a tract of land by

the acts of 1805 and 1814. The petition states a confirmation, not by these acts, or either of them, by the act of May 11, 1820. Without a title resulting from an act of Congress, the patent cannot convey away any part of the lands of the United States, for Congress alone has the disposal of them. The President can exercise in regard to them no power that is not vested in him by law. The patent is evidence of the conveyance. Whatever the law has given passes, but no more. No effect can be given to the patent, which is a mere emanation of the law. Beyond the law no public officer can extend or limit its operations.

If this position be true, it follows that courts of justice, from whom land is claimed under a patent, may examine its conformity, or its discrepancy, in regard to the law. Otherwise, justice cannot be administered.

It has never been doubted, in the courts of the United States, nor in those of any of the States, that a judicial inquiry may be instituted, tending to impeach a patent. But conflicting opinions have been entertained as to the respective powers of courts of law and courts of equity. In some of the States, a patent is considered as *primâ facie* evidence of title, and open to extensive evidence to impeach its validity. By others, that the defects must appear on the face of the patent to authorise a court of law to pronounce invalidity, and that unless the defect so appear, the patent is only voidable, and recourse must be had to a court of equity. Elsewhere, it has been considered, that a court of law may inquire, whether the patent was issued without authority, or against the prohibition of a statute, or whether the State had title to land granted. 11 *Wheaton*, 382.

The Supreme Court of the United States has declared, that it would be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by Government to supervise the progressive course of a title from its commencement to its confirmation on a patent. But in order to guard against this conclusion, that this doctrine would lead to closing the door against all inquiry into any matter whatever, or beyond the grants, for the purpose of avoiding it, the court declares that the great principles of law and justice would be violated, if there did not exist some tribunal to which an injured party might appeal, and the means by which an elder title was acquired, might be examined, if it had been acquired by the violation of principles essential to the validity of a contract, but that a court of equity is the more eligible tribunal in general, for these questions, and they ought to be excluded from a court of law. The court, however, adds, cases may happen in which the grant is absolutely void, or inoperative, as when the State has no title to the thing granted, or when the officer has no authority to issue the grant. In such cases the validity of the grant is necessarily examinable in law. *Polk's lessee vs. Wendell et al.*, 9 *Cranch*, 87. In the same case, the same court held, that a court of law may inquire whether the patent was issued without authority, or against the prohibition, or whether they still had any title. 5 *Wheaton*, 293.

As courts of equity, as distinguished from law, are unknown to the jurisprudence of Louisiana, it follows, that the courts are competent to administer justice in cases in which it must be sought in other States from a court of equity.

It has, however, been urged that the Supreme Court recognizes, in cases they speak of, an elder title, which presupposes a less ancient one in the defendants. But our statute places all defendants in petitory actions on the same footing. "The possessor, whoever he be, must be discharged, if the

plaintiff does not make his title. *Code of Practice*, 44. A mere possessor, squatted, may demand the production of a title, for it is by the strength of the title that the plaintiff must conquer.

We are, therefore, to examine the two acts of Congress, which are the basis of the opinion of the register of the General Land Office, on the certificate of whom, the President of the United States confirmed the vendors of the appellees in their title, and the one under which they themselves allege its confirmation.

The act of 1805, relates in the first section, to claims supported by a duly registered warrant, or order of survey. The present is not alleged or shown to be supported by any such document.

The second section relates to claimants having made an actual settlement with the permission of the former Spanish officers, according to the laws, usages, and customs, of the Spanish Government, on a tract of land, and having inhabited and cultivated it before the 20th December, 1803. In my opinion, there appears, in the present case, no such permission, and certainly no cultivation. *A permission to settle*, in the land laws of Louisiana, is a well known technical expression, used to designate an incipient step in the acquisition of lands of the domain. The settlement is effected by clearing, inclosing, inhabiting, and cultivating, the tract. If it be on the Mississippi, the settlement includes the making a levee along the shore, and a road between the levee and the land. The section under consideration requires, that besides the permission to settle, there should be inhabiting and cultivating.

The commissioners to whom the claim was presented, expressed their opinion that it was not one on which they had authority to act. They, however, added their belief, that the confirmation of it by Congress would be an act rather of justice than of generosity.

These gentlemen did not express the reasons which induced the conclusion they came to, *i. e.* that they were without authority to act on the claim.

On my first view of the case, I thought it presented an apparent ground for their decision: the absence of any allegation or proof of cultivation.

It is, however, my duty to consider that which is presented by the counsel of the appellants, viz: that in the land laws of the United States, the word *land* is restricted to *rural*, and not extended to *urban* estate, *i. e.* city or town lots.

It appears that throughout the land laws of the United States, whenever any provision relating to tracts of land in the country, are intended to be extended to city or town lots, an express clause is added for such extension. Acts of Congress, May 18, 1824, and March 2, 1821. Land Laws, 736, 788.

The mention of surveys, locating, permission to settle, and imperfect grants, is also incongruous when applied to a city or town lot. Its situation, dimensions, the bearing and length of its lines, are established by the plan of the city or town in such a manner as to require no survey. A patent may describe it without any survey or location. If it be granted, the grant is generally a complete one. There are no incipient or intermediate steps to be taken to complete the conveyance. No permission to settle; no return of any process verbal of putting into possession; no plat to be filed before the grant is finally issued.

These observations are cogent, and supported by evidence in the conclusion to which they lead; having been adopted by the Executive of the

United States, as appears by the instructions of Mr. Gallatin, Secretary of the Treasury, to the clerk of the land commissioners, dated August 6, 1811, he says: "I consider also the decision on town lots where the title was not complete, as altogether out of the jurisdiction of the board, since one of the essential conditions was that of not only *inhabiting*, but *cultivating*, an expression intended and applicable only to farms or country tracts."

In addition to this, a decision of the Supreme Court of the United States dispels any doubt that might remain. This tribunal has held, that an authority to enter lands, did not include city or town lots. They said the literal meaning of the terms of the act was restrained and limited by the context, and by considerations arising out of the general system of land laws of the United States, into which this act is ingrafted. 12 *Wheaton*, 587.

I leave the examination of the first act of Congress recited in the patent with the reflection, that I am unable to see how it can avail the appellees.

The act of 1814, is the one next mentioned in the patent. This renders it necessary I should examine it, although the appellees ground the confirmation of their claim upon another act, viz: that of 1820.

To the act of 1814, is applicable every thing which I have observed with regard to the limitations and restraints of which the word *land*, in the land laws of the United States, is susceptible. I might, therefore, dismiss the consideration of the act, with this further observation, that it cannot be correctly extended to a city or town lot.

Supposing, however, that my conclusion in this respect is erroneous, I am to inquire what claims this act confirms. They are:

1st. Those embraced in the commissioner's report.

2d. Those which are supported by an incomplete French or Spanish grant, warrant, or order of survey, granted prior to the 20th of December, 1803.

3d. The grant must contain a special location, or the tract must have been located and surveyed by a French or Spanish officer before that day. All this must appear by the report of the land commissioners.

It is not pretended that there was any warrant or order of survey, nor any survey whatever of the premises.

There must, therefore, be a grant. A grant of what? Necessarily of land. Did the ancestor of the vendors of the appellees apply to Miro for the grant of a tract of land, or even of a city lot? If the appellees answer that the application related to a lot, they must shew that some part of the space between the houses and the stream, had ever been divided into lots. This they cannot do.

The application was for leave to build a small house or cabin, that might afford a shelter to an indigent sufferer, whose misfortune entitled him to commiseration and relief. The Governor wrote, "*granted*," and signed.

The application and permission of Carondelet, are of the same nature.

Here I am unable to see even an imperfect grant. An imperfect grant, is one which is intended to have, but has not yet received, its perfection. But this permission, though it might be continued, does not appear to have been intended to ripen to a grant of land. A grant of land differs much from a permission to inhabit.

But the act of Congress has another requisite. The grant must contain an actual *location*, or the tract must have been actually located or surveyed before the twentieth of December, one thousand eight hundred and three.

What is called Miro's grant, consists of the words "*granted.*" The petition at the foot of which they are written, does not apprise us where the poor man wished to erect his hut, except that it was opposite to Bienvenu's house. Let it be assumed that Bienvenu's house was in front of the city. In the part of the city where the appellees contend the *locus in quo* is situated, the curve of the river leaves a distance of about two hundred feet between the first row of houses and the levee. A small cabin may be supposed to be twenty feet square; if so, five such cabins might stand opposite Bienvenue's house, between it and the levee; so the spot to be covered by the cabin was not *actually* located in the grant.

The counsel of the appellants has further contended, that the claim is not embraced in the report of the land commissioners. The act certainly meant an *official* report, *i. e.* one made under the sanction of an oath of office, a report made in a case in which the commissioners believed it their duty to bestow their care and attention, as officers of Government.

If these gentlemen, the President and the Supreme Court of the United States, did not err, it is my duty to say, and believing they did not err, I must say, the claim was one of which the board had not legal cognizance, and their report was not an official act. In other words, it was not such a report as the act of Congress under consideration refers to.

Were I of a different opinion, I should perhaps think that the commissioners, having expressed their opinion, that the claim was one over which they had no authority to make a decision, the claim was thereby officially dismissed from the consideration of the board; and that after this, any opinion which these gentlemen might be pleased to express, to soothe the disappointment of an applicant whose claim was dismissed, could not be considered as the expression of any official opinion of the board.

These reflections force upon me the conclusion, that the claim of the vendors of the appellees was not confirmed by either of the acts of Congress, mentioned in the patent.

This brings me to the inquiry, whether it was confirmed by the act of May eleventh, 1820, as is averred in the petition?

The first section of that act is the only part of it under which any claim to a confirmation can be based. It is in the following words: "Be it enacted, &c., that the claims for land within the eastern district of the State of Louisiana, described by the register and receiver of the said district, in their report to the commissioner of the General Land Office, bearing date the twentieth day of November, 1816, and recommended in the said report for confirmation, be, and the same are hereby confirmed against any claim on the part of the United States."

Had the President stated, in the patent, that the claim had been confirmed by this act, the question would arise, whether this circumstance could dispense the appellees from administering proof of the claim coming within the provisions of the act.

This proof has not been administered, and as the law is the same, the *non apparentibus & non existentibus,* I must say that the claim is not confirmed by this last act.

The claim being unconfirmed, it follows, the United States are still owners of the *locus in quo,* (if they ever were,) and that the appellees have acquired no title under the patent.

The action is a petitory one, on which the plaintiffs cannot succeed, except on the strength of their own title, and they cannot avail themselves

of the weaknesss of that of their adversary; no, not even in the absence of any title, but the right which possession gives. This principle has come to us from the Roman law. *Actore non probante absolvitur reus.* It has been engrafted from the common law of England, into the jurisprudence of every other State of the Union. If the plaintiff does not make out his own case, he must be non-suited. Our own Legislature has made it with us a textural provision, "in an action of revendication, if the plaintiff does not make out his title, the possessor, *whoever he be*, must be discharged." *Code of Practice*, 44. We have proclaimed it in numberless cases and very lately in those of *Philips vs. Flint, and Compton vs. Mathews*; 3 *Louisa. Rep. Harper vs. Destrehan*, 12*th Mart.* 31. *Sassman vs. Aymé and wife*, 9*th ibid.* 267. *Abat vs. Rion* 7*th ibid.* 562. *Hervey et al. vs. Rusell*, 3 *N. S.* 59. *Congregation of St. Francis vs. Lauve, ibid.* 62. *Johnson et al. vs. Inerarity* 4, *ibid* 10.

On this part of the case I think the law is with the defendant.

On the plea of prescription, the appellants may, in my opinion, resist the appelleés pretensions in the name of the inhabitants of New Orleans, as a part of the public, in the same manner as any one of them of lawful age might have done.

The public, whose right the appellants vindicate, include not only the inhabitants of New Orleans, but those of any other city, town, or parish, in the State, or even strangers. Of the *locus in quo*, the public have had the use of the premises from the foundation of the city to this day. If the Supreme Court of the United States, and the late Spanish tribunals, were not in error, in the cases cited, I may confidently express my humble opinion, that to the streets of New Orleans, that wide space which Dupanger called a *quai*, and the small square behind the Cathedral, and between it and Royal street, the public need not produce any other evidence of the right to the use, but the plan of the city and the subsequent use.

It would be otherwise if the appellants vindicated a right peculiar to the inhabitants of the city, for the establishment of such a right would require the production of a title. The majority of the court are of opinion, that the city would be protected in this case by a possession of forty years. They have reckoned the possession from 1769, making to 1830, the period of the inception of the present suit, sixty-two years, from which they déduct the possession of the vendors and their ancestor, from 1788 to 1812, as twenty-four years, leaving against this possession thirty-eight years only.

I think the possession of Bertrand and his heirs had not the character which gives it the effect of interrupting the prescription.

We have the evidence of the beginning of this possession. His was not an adverse possession, any more than that of one who had leased the house of a minor from his tutor. The public have the right to a considerable space of ground dedicated to the public use. The sovereign by his officers regulated this use as the *parens patriæ*. The guardian and administrator of public places, after a terrible conflagration, it was deemed more suitable, that a few sufferers, reduced to distress and beggary, should be relieved by being permitted to erect temporary cabins on public places, rather than by pecuniary aid, drawn from private commiseration.

In one thousand eight hundred, by the rétro-cession to France, the king of Spain will, on the occupancy of the ground covered by these cabins, was determined, by his ceasing to have the capacity of regulating the use of public places in Louisiana. This capacity passed successively to France and

the United States, and finally was vested in one thousand eight hundred and twelve, on the State of Louisiana, before the patent under which the appellees' claim was issued.

I think the judgment of the court below ought to be reversed, and that ours should be for the defendants.

Mathews, J.: In this case the plaintiffs claim title as unconditional owners of a lot of ground, which they describe as being situated in the city of New Orleans, between St. Philip and Main streets, having a front on the old levee of eighty feet, forty-six feet on one of the side lines, and fifty-three on the other, and seventy-nine feet six inches on the rear, where it is limited by the public road, &c.

The evidence of title adduced on the part of the plaintiffs are, first, a permission to build and occupy the lot in question, granted by competent authority, in the year one thousand seven hundred and eighty-eight, whilst Louisiana was a province of and under the Government of the king of Spain, to Thomas Bertrand. Second: possession and ocupancy of the *locus in quo*, by him until his death, in 1803, and continued by his widow and heirs until 1812. Third: claim filed, on the part of the possessors, before the land commissioners of the United States; a report in favor of it, by them, to Congress, and confirmation by that body, according to an act passed in 1814; and finally a patent or grant, issued in due form, by the proper authority, in the year 1821. All the right, title, and interest which the grantees acquired, have been regularly conveyed to the plaintiffs.

The validity of the title thus set up on the part of the plaintiffs, as constituting them absolute proprietors of the lot claimed, is denied by the defendants.

The patent, or grant, from the United States, is alleged to be insufficient to convey title to the grantees, as having been issued by the President without legal authority. Reference is made to the laws under which the patent was issued in the instrument itself; and I am of opinion, that a proper construction of them warrants the authority assumed by the chief magistrate, so far as to convey all the title which the United States had in the premises, to the grantees, and is confirmative of that which they had obtained from the Spanish Government. The right which they acquired from the former sovereign of the country, and which seems to be the basis of the grant from the United States, was, as shewn by the evidence of the cause, a permission to build on and occupy the lot of land in question; it was, in truth, a permission to settle on it. But the tenure by which the possessors held the premises, (perhaps,) depended on the will of the power which gave the permission to possess and occupy. The authority of the Government, however, which permitted the occupancy, ceased before any change of will was expressed; and that which succeeded, has, by its grant, rendered the tenancy, which may have previously been temporary, absolute and unlimited; giving to the grantees all the right and title which any of the sovereigns of the country at any time had, to the parcel of ground now in controversy; according to the various transfers which took place, from the king of France to the western company constituted by his authority; from them retroceded to their sovereign; from this power ceded to the monarch of Spain; from him to the French republic, and from the latter to the United States.

According to this view of the case, I consider the plaintiffs as standing in the situation of persons claiming property under a grant from the Spanish

Government, as the basis of their title; and consequently, they must succeed in their claim, unless the defendants have shewn a better title in themselves, or that the property claimed was inalienable at the time of the grant, either from its place amongst other natural things, or by political and legal destination. It is already perceived, by the bare statement of these premises, that I assume as true, the right of property in the sovereign of Spain, to all the unappropriated territory of the province of Louisiana, such as it was held by France, previous to the cession to the Spanish monarchy by the former owner.

By the transfer, all the lands of the colony not previously granted, became a part of the public domain of the king of Spain, who, at the time of the acquisition, possessed complete and unlimited sovereignty over all his dominions. Certain portions of this sovereign power, were necessarily delegated to viceroys, governors, and other colonial officers of the king; by this delegation they possessed limited attributes of sovereignty, amongst which appears to be the right to concede or grant to individuals, parts of the land belonging to the public domain. The truth of this position is evidenced by the uniform mode by which grants were obtained in Louisiana, whilst under the dominion of Spain; and it cannot be denied, that this power was exercised by the proper officers at the time when the permission to build on and occupy the *locus in quo*, was allowed to Bertrand, under whose heirs the plaintiffs now claim title, this permission having since assumed the character of an unconditional grant.

Whatever questions may have been raised and commented on by authors, who have examined the different political institutions of the States and kingdoms of Europe, relative to the right of their sovereigns to alienate certain things belonging to the public domain; certainly no doubt can now properly exist as to that right, in relation to the vacant and unappropriated lands in their colonial dominions; which have been constantly granted to individuals ever since the establishment of colonies in America.

The title or right of property claimed, to the lot in question, by the defendants, as a common of the city, has been so fully examined by the judge, with whom I concur in opinion as to all the important questions presented by this case, and so clearly shewn to be without foundation, that I deem it needless to investigate this point of the cause. In truth, as to this matter no difference of opinion seems to be entertained by any one of the members of the court.

A plan of the city of New Orleans, which purports to have been made in 1728, is introduced in evidence on the part of the defendants, obtained from an office in Versailles, a place of deposite for official papers, and documents relating to the cities and forts of the French colonies in America. This document is relied on by them as establishing a right of use to the public, incompatible with private ownership of any part of the space of land marked and designated on this plan by the word *quai*. The city being laid out in front of a bend in the river formed by nature in such a manner as to exhibit a portion of an elipsis, the plan shows an irregular space between the first line of houses and the river, which is much wider at the extremities of this bend than in the centre; and this is the space denominated a *quai;* the greater part of which has never been used as such, particularly towards the limits of the city.

The question as to the right of property in the corporation being disposed of, it only remains to examine their opposition to the claim of the plaintiffs,

on the assumption that the lot of ground sued for, was, at the commencement and perfection of their title, a place designated and appropriated perpetually to the use of the public, by legal effect of the establishment and plan of the city; and consequently inalienable as being unsusceptible of individual ownership.

In the investigation of this question, much reliance was placed on the proper meaning of the word *quai*, and a just idea of the thing intended to be conveyed to the mind by its use; the assistance of philology must necessarily be called in aid, for in this respect it is in some degree an affair of words.

The definition given to this word in French, according to the *Dictionnaire Critique de Feraud*, is "*Levée faite entre la rivière on l'eau d'un port et les maisons pour la commodité du chemin, et pour empêcher le d'ebordement dans les crues d'eau.*"

The meaning of this word as understood in France and her colonies, (according to the citation made by Judge Moreau in his brief of argument, from *Langlade, nouvelle Legislation aux mots plans des villes,*) does not materially differ from the definition given by Feraud. By this author, *quai* is defined to be "*une levée souvent revêtue de pierras de taille, dans les villes ou ports situés sur les rivières navigables et dans un espace laissé vacant entre la rivière même et la première ligne des maisons, pour la commodité du chemin, et pour empêcher le d'ebordement de l'eau.*"

The definition given by other lexicographers, is nearly similar to that quoted by Feraud. (*See Duboille and Deverger.*) These philologists show that it conveys the idea of an artificial work, or bank raised by the labor of man. Quay, according to Dr. Johnson, means an artificial bank to the sea or river, on which goods may be conveniently unladen. The greatest portion of the space delineated on the plan of the city introduced in evidence, as existing between the front lines of houses, or lots laid out for building on and the river, was evidently not a *quai*, (according to the general acceptation of that word,) at the time this plan was made; nor was it such at the time Bertrand obtained permission from the proper authority of the Spanish government to occupy the lot of ground now in dispute. Neither was this small space a part of the *quai*, properly speaking at the time of the grant from the U. S.; for it appears by the testimony of the city surveyor, that the levee was not extended over it until the year eighteen hundred and twenty-two, and the grant bears date the year preceding.

But, perhaps it may be required that some effect should be given to the word *quai*, inscribed on the plan. This may be done by allowing it reference to that part of the space whereon it is found, which was a *quai*, according to the meaning of the word as generally received; *i. e.* the levee which existed on the bank of the river and the shore, between the exterior of the levee and the water.

If, however, it be admitted that this whole space was intended to be a *quai* of the port of New Orleans, it does not follow as a legal and necessary consequence, that no part of it could be alienated by the sovereign of the country; it being admitted that this species of property may be either public or private. And it seems to me to be of the very essence of the inalienability of things according to political rules, that they are not susceptible of private or individual ownership.

Toullier, in his commentaries on the *Droit civil francais*, distinguishes between things belonging to the public domain which are susceptible of

private property, and those which are not. Amongst the latter class are placed navigable rivers, ports, harbors, roads, (*les rades,*) which, by their nature are not more susceptible of possession by individuals, than the sea and the waters which cover it, of which the right of property is vested in no one, but the use of which is common to all; subjected to police regulations which direct the manner of enjoying it. *Volume* 3, *No.* 36. All other things belonging to the public domain are susceptible of private ownership; but some of these enter into commerce, others do not. No. 38. *Les biens hors du commerce, sout ceux qui ne sont pas susceptibles d'une propriété privée. Tels sout les chemins, les routes, les rues, les edifices publics, les eglises, les portes, murs, &c.* No. 39. These commentaries, although purporting to be on the *Code Napoleon,* seem to embrace, in part, the doctrines contained in Domat's treatise on the Public Law of France. In the section of that work which treats of things which serve for public uses, we find express mention made of public places, which may be considered as *hors du commerce.*

Political regulations similar to those which exist in France, seem also to prevail in the Spanish monarchy. *See 5th Partidas, title 5, law 15,* with the notes of *Lopez.*

They appear to have adopted from the Roman civil law, or as sometimes denominated, *jus gentium,* perhaps improperly.

The principles on which these regulations are based, are to be found in the *Roman digest Book* 43, *titles from* 7 *to* 12, *inclusive.* A great proportion of the laws which these titles contain, are mere police rules or ordinances, perhaps inapplicable to modern states and kingdoms. Their principal utility in affording any light on the present investigation, arises from the definitions found therein of things public, or such as are appropriated exclusively to public uses.

To admit the right of the defendants to question the title of the plaintiffs, derived as it is from the sovereign power of the country, without showing any title in themselves to the thing in litigation; it must not rest solely on their authority to interfere in relation to the police of public places; and whether this authority extends to places which in no manner belong to the city might be questioned. The United States, by virtue of their sovereign power, (limited as it may be in regard to the several States of the Union,) have full authority over all the ports which belong to this Union, necessarily to enable the general Government to collect duties imposed on foreign merchandise. By them ports of entry can be established, and perhaps abolished. And there would be nothing unreasonable or unjust in an assumption of power in them to regulate quays, as an appendage of the ports, where all goods imported should be landed, to facilitate and secure collection of the public revenues.

But let the case be considered as if the defendants had a right to interpose and contend for the public use of the *locus in quo.* It is a public place, either from its natural situation or by distinction of the sovereign power which laid out the city. It is not a place which the public have a right to use in common by its nature. It is no part of a navigable river, or of the bank of such river. "*Ripa ea putatur esse quæ plenissimum flumen continet. Secundum ripas fluninum loca non omnia publica sunt cùm ripæ cedant ex quo primum á plano vergere incipit usquè ad aquam.*" *R. D.,* 43, 12, 111, 1 *and* 2. It is proper here to give the translation of Rodriguez. *Los terrenos immediatos à las riberas de los rios,*

notodos son publicos; parque cede á la ribera todo lo que empieza á declinar desde lo llano hasta el agua.

On the border of the Mississippi, that space which extends from the exterior limit of the levee to the water, may be considered as the bank, where no batteree intervenes; the lot in question was outside of the levee at the commencement of the plaintiff's title, and continued to be so situated up to the period of the grant from the United States. And it was not at either of those periods a part of the public highway or road, for its location is betwixt the levee and the road, as they then existed. By the aid of philology it has already been shown, (properly speaking,) that it made no part of the *quai*. Was it any part of the public place, *place publique* in French, *plaza* in Spanish? It is not designated as such on the plan of the city, and I do not think that the bare circumstance of its having been left vacant on that plan, suffices to give this character to that space of which it made a part. This seems to have been the understanding of the officers of all the governments into whose hands Louisiana has fallen at different times. Witness the apparent occupation of lots for private purposes, situated within its limits, according to one of the plans exhibited, as having been made whilst the colony was under the control of the Western Company or of France; the grants of various parts of it by the authorities of Spain, and finally the grant now produced for the lot in dispute. The grants from the Spanish government were to Lioteau, to Magnon, and to Metzinger. The title under this last grantee was questioned by the corporation of the city, and a decision of the Supreme Court pronounced in the case as reported in 3d Mart., beginning at page 303. This decision is cited by the defendants in the present instance, as favorable to their pretentions. I cannot view it in that light. I do not perceive that the production of the plan of the city places them in a more favorable situation in the present case, than they were in the former. This plan does not show the *locus in quo* to be a part of a street, public road, or any other public place. In my view, it is a part of vacant land in the city, which belonged in full and unconditional property to the Western Company of France, and as such was by them retroceded to that monarch, and as such has from him, through intermediate transfers, been regularly transferred to the United States, was a fair subject of alienation, and has been legally granted to Bertrand's heirs, under whom the plaintiffs claim title.

Squares or other spaces of land appearing to be left vacant in the plan of a town or city, are not (in my opinion) in consequence of this fact alone, to be considered as public places, and irrevocably dedicated to the use of the whole world. The plan ought to contain something on its face to show their destination and appropriation to such use, in order to imply a promise on the part of the original owner of the soil and founder of the city, that they should always remain open for the use of the citizens and the public in general.

There may have been want of wisdom and foresight in the sovereigns who made these grants as above stated. The occupancy and use of the lots thus granted by individuals and for private purposes, may be very detrimental to the interest of the public at the present time, in consequence of the increased and increasing commerce of the city. But these are considerations which cannot be taken into view, in deciding on the vested rights of the parties litigant, involving mainly questions of title.

In truth, I am unable to perceive any substantial difference existing in

this case from that of Metzinger, and I hold the maxim, *stare decisis*, to be a good one. The same measure of justice should be meted to each and every one standing in similar circumstances.

It is seen from this view of the case, that I have omitted to consider many of the authorities which relate solely to police regulations, touching the property of a State or that of a city or town incorporated, believing that they afford little aid in the decision of the present dispute.

Porter J: This is a petitory action for a lot of ground, lying and situated between the front street of the city of New Orleans and the river Mississippi.

The plaintiffs are assignees of the heirs of Thomas Bertrand, deceased, who, in the year 1788, obtained from the then Governor of Louisiana, permission to settle and erect a house in the *locus in quo*. After occupying the house built by him for the space of six years it fell into decay, and he obtained leave to rebuild from the Spanish Governor then in office in the colony. Bertrand continued in the possession thus conferred on him up to the time of his death, which took place in the year 1803, and that possession was maintained by his widow and heirs until 1812; in the whole a period of twenty-four years. From some cause or other, unexplained by the evidence on record, they then left the premises. Before doing so, they had, however, filed a notice under the act of Congress, with the commissioners of the United States, claiming the lot in virtue of the permission to settle, and settlement in conformity therewith. The commissioners reported favorably on their demand. This report was confirmed by an act of Congress, and on the 17th February, 1821, a patent issued from the general Government to the representative of the grantee.

The patent, it was contended, does not convey a title to the premises, because it is not one of those claims which were confirmed by the act of 1814. That act, according to the argument at bar, provides only for *lands*, a term which does not include *town lots*. Whether discussing whether this position might not be correct in some cases, it is deemed sufficient to remark on this now before us, that Congress must be considered the best judges of what they meant by the word *lands* in the act referred to, and that, as they had a report before them, recommending the confirmation of a claim to a town lot and did confirm it, it is not open to us to question their construction of a previous enactment made by them. Nor is this view of the subject in any respect impaired by the last act, limiting the confirmation *to all claims which were filed according to law, and are embraced by the report;* because nothing prevented the claimant filing her title, and asking for the decision of the commissioners of the United States, although it might be doubtful under the law, whether it could be confirmed. Again, no one has a right to make this objection, save him who claims under the United States or some of the Governments which previously possessed Louisiana. So that we are of necessity compelled to examine the validity of the defendant's title.

The demand of the petitioners is resisted on two grounds:—First, that the defendants have title to the premises; and second, that the space of ground between the front street of the city of New Orleans and the river Mississippi, was designated and set apart for public purposes, and could not be the subject of private ownership.

In support of each of these means of defence, the defendants rely prin-

cipally if not solely, on a map found in the office of the Marine and the colonies of the French government, by which it appears that in the year 1728, a plan was made of the city of New Orleans by an officer holding a commission under that Government. On this plan the river Mississippi is marked with the same curve it exhibits in front of the town at this day. An open space is shown to have been left between the front street and the river; this space opposite the centre of the city is comparatively narrow, and not more than —— feet. But owing to the bend of the river the distance between it and the street increases rapidly as you recede from the centre, and at each extremity of the city it extends to six hundred feet. The representation of the ground thus left vacant on the plan produced in evidence is inscribed with the word *quai.*

On the first point, which presents the question of title in the city, I believe the court is unanimous. Our consultations, if I understand them right, brought us to the conclusion that it had no solid basis to rest on. But, as it is relied on as a means of defence, it becomes the duty of the members of the court, who are of opinion that the other grounds assumed by the defendants are not tenable to explain the reasons why this pretention to title cannot be maintained. The examination of the law on this point I think too will be found not without its utility in another part of the case. It will serve to elucidate matters involved in the inquiry, as to the alleged destination of the *locus in quo* to public purposes.

By the laws of France a city or town could not acquire right or title to the soil of immoveables, *or to the use of them*, without letters patent from the king. This branch of the case was elaborately discussed at the bar, and I think the plantiffs fully sustained the position assumed by them. To the books cited may be added *Domat.* In treating of communities he declares as a primary rule, that they should be established for the public good, and by order or permission of the prince. Under the title *De la puissance, des droits, et des devoirs de ceux, qui ont le gouvernement souverain*, after repeating that no one can establish communities but the king, he adds, "c'est une suite du droit de permettre les établissement des corps et communantés de leur permettre aussi de posséder des biens, meubles et immeubles, *pour leurs usages*, et cette permission est particulièrement nécessaire pour la possession des immeubles, car commeces communantés sont perpetuelles, leurs immeubles deviennent inaliénables."—With some other observations not necessary to be quoted, he concludes: "Ainsi les communantés ne peuvent posséder d'immeubles, que par permission du prince; et à la charge de faire cesser ses interêts et ceux des Seigneurs. Et cette permission s'accorde par des lettres qu'on appellee d'amortissement." *Domat, Droit public Liv.* 2, *lit.* 2; *sec.* 2, *Nos.* 14 *and* 15; *Ibid., lit.* 15. *sect.* 1; *No.* 1 *and sect.* 2; *No.* 1, *Maximes du Droit francais*, 58, *règle* 13; *Guyot's Repre. vol.* 62, *pages* 455, 456, 457 *and* 459; *Denissart, vol.* 4, 728 *à* 755.

If the laws of Spain could affect this case, I understand their provisions, in relation to the rights of corporations to immoveable property, to be similar to those of France. *By the 9th law of the 28th title of the 3d Partidas*, the definition given of common property in towns or cities is, those public places, &c., which are "*establicidos é otorgados para pro communal de cada cindad o villa;*" established, and granted, to be common to a city or town.

An ignorance of the laws of France cannot be presumed in the government of that country. Not the slightest reason has been given, why they

should have been deviated from in this instance, if the soveriegn had intended to grant the space of ground between the first streets and the river, to the city. Satisfactory reasons can be assigned for making the plan, wholly adverse to the idea that it was to be a substitute for a grant. France, like all other civilized nations, was, it is highly probable, anxious to obtain, and at all times to preserve within her reach, a correct knowledge of her colonial possessions. Hence, no doubt, orders were given to her officers on foreign stations, to make surveys of the ports and harbors, and to furnish plans of the towns, in her colonies. That produced in evidence, was made in the year 1728. It was never delivered to the city, as a muniment of title. Its existence appears to have been unknown to the corporation, until a quite recent period. It cannot be believed, that if the king intended the inscription on the document offered in evidence, should operate as a grant, that those to be benefitted by it, would have been so long left in ignorance of a fact so important to them. When, to these considerations as to intention, we add another and an obvious one, that until the town had a legal existence given to it, by letters patent, there was no corporation to which, by the laws of France, the grant could be made, I think it must appear plain to all who will consider the subject, that the pretension of title set up, on the part of the corporation, cannot be supported.

But it is said, though the title to the property may not be in the corporation, still the plaintiffs cannot recover. The *locus in quo* was destined to public purposes, when the town was established; that destination was irrevocable; and the property so appropriated was for ever put *hors du commerce.*

Before entering on this question, I think it proper to remark, that we may dismiss from our consideration the authorities to which we have been referred at common law. For the case before us, is not as to the rights retained at common law, *by a private individual,* who designates a place for public purposes. Our inquiry must be, what were the powers *of the kings of France and Spain, under the laws of those countries,* over a place assumed to be set apart for common use, and of which, it is admitted, no grant was made to the town. If the case was to be decided by the books referred to in the former system, I am not prepared to say, the plaintiffs could recover. They certainly carry the effect of a *destination to public use,* as it is called in that jurisprudence, to a greater length than the laws of France or Spain do. Such dedication, if once made, appears to be irrevocable, so long as the public may use the object so appropriated. The decision of the Supreme Court of the United States, places the setting off commons to cities, on the same grounds as that of streets and highways. That court finds no difficulty in the want of any person, natural or artificial, to accept the gift. It supposes the fee to be in abeyance until the town is incorporated, and the moment it becomes so, the title rests in the corporation. The learning and ability of the judges of that tribunal, forbid the belief that they did not correctly expound and apply the rules of their jurisprudence to the case before them. I have no doubt they did. But it appears to me, the doctrine recognized by them would require considerable limitations and modifications, before it would be conformable to the laws of France or Spain, which govern this case. One example will show this. When commons are set apart, for public use, the Supreme Court considers the fee in abeyance, until a grantee exists, who can accept it; and even until that event takes place, the grant is irrevocable. This principle appears wholly irreconcilia-

ble with the rule of the French law, that no community can have a legal right to *the use* of immoveable property, without letters patent from the king; and it is equally difficult to reconcile it with that of the Spanish which recognizes no place, as common property, for the use of the city, but that which it acquires by grant, purchase, or prescription. But the discrepency between the systems, is more marked in relation to the power of the supreme authority in the state over public places; and the difference cannot fail to excite attention in this case, because it will be found to turn, in a great measure, on the extent of that power. By the common law of England, if the king once established a port, he lost the power of resumption. He could not afterwards contract its limits. So rigid was this rule, and so productive of inconvenience was it found, that an act of Parliament became necessary to vest that authority in the crown. I am greatly mistaken, if the political institutions of France or Spain, affixed any such limits on the power of the kings of either country. Sitting here, it is not for us to inquire which system is the best; it is sufficient if they differ, and that which supports the pretensions of the defendants is not ours. 1 *Blackstone, Com.*, 264, 6 *Peters's* 431. While on this part of the case, it may be proper to notice an argument urged from the bar, which would seem to create some difficulty in sustaining the plaintiff's pretensions. The ground left vacant in front of the city, was compared to the streets, and it was asked, could the sovereign, after marking them out for the use of the city, afterwards make them the object of individual ownership. The Supreme Court of the United States, in the case already cited, seem to consider any ground left vacant by the proprietor in establishing a town, as subject to all the rules which govern an appropriation of land, to streets and highways. The streets of a town are no doubt what is denominated in our law public places, and they are protected from change and alienation, by all the rules which apply to things of this description. But the power of the grantor over them, even if he should be the king, is, in my opinion, much more limited, than that he possesses over other things of the same kind. So long as the town remains unincorporated, and he retains the power of regulating its police and government, by laws and ordinances, he may modify, abridge or enlarge the streets, but he cannot deprive the inhabitants of the use of them; and for an obvious reason. Streets are indispensable to the enjoyment of urban property. Without them a town could scarcely be said to exist; the inhabitants of it would be as prisoners in their own houses. It may, therefore, be readily admitted, that the sovereign power of no country could deprive the owners and occupants of lots and houses, of things indispensable to the use and enjoyment of the property sold, or conceded, without violating the plainest dictates of justice and the general principles, of law applicable to all other cases of the same kind. But its inability to do so would not proceed from their being destined to public purposes, but because without them the property granted could not be enjoyed. Just as on the same principle, an individual who granted a portion of his land which could not be reached but by passing over other portions of it, would be considered as having conceded to the grantee the right of way over the part retained. It is a well settled principle, that whenever an individual or the law giveth any thing, there is impliedly given at the same time, whatsoever is necessary to its enjoyment. The limitation, therefore, contended for on the power of the sovereign over streets, may be well conceded to the whole extent pressed in argument, without at all affecting his authority, or his rights

over vacant ground not proved to be necessary to the use of private property.

The case has been argued on the power of the crown over public places; but this presents the question in too general a shape. In my judgment the proper inquiry is, what power the Sovereign, in whom the right of soil exists, has over a space of ground left vacant when the city was laid out, which was afterwards designated on a plan as a quay. But the examination of the authority in its application to any thing destined to public use, may aid us in reaching a correct result, though that result could be obtained in this particular case, without such examination.

There are two kinds of things, says Domat, destined to the common use of men, and of which every one has the enjoyment. The first are those which are so by nature; as rivers, the sea and its shores. The second, which derive their character from the destination given them by man; such as streets, highways, churches, market-houses, court-houses, and other public places; and it belongs to those in whom the power of making laws and regulations in such matters is vested, *(la police,)* to select and mark out the places which are to serve the public for these different purposes." *Domat, liv.* 1., *title* 8., *sect.* 1., *art.* 1.

Admitting, therefore, that the whole space of ground left vacant between the front street of the city and the Mississippi river, was destined to common use, and that it could not be the subject of private property, a question which will be examined hereafter, I do not see how the conclusion is obtained that it is for ever to remain so. If the doctrine has any foundation to rest on, it must be this, that individuals acquire a right by the dedication to public purposes paramount to that of the sovereign by whom the dedication was made, though the right of soil, and the authority to make regulations and laws for the police of cities, were both vested in him. This proposition I consider untenable. Reason, public convenience, and the law which governs the case, are all opposed to it. The changes which are continually produced on the surface of the earth by natural causes, and the alterations in the positions of the various societies of men who occupy it, repel such a doctrine. Places where cities once stood are now deserts. Where highways once ran, highways are no longer practicable or convenient. Turns require to be enlarged and the public places to be changed. There is perhaps no spot on earth where the incompatibility of such a doctrine, with public convenience and public improvement, is more manifest than in the city we live in. The river on whose banks it is placed is continually working important changes in its localities, which must be met by the labor and industry of man; and a principle of law requiring every public place to remain as it was originally designated, if we are to judge of the future from the past, would completely defeat the purposes for which that designation was first made. The same causes producing a necessity for alterations in ports, harbors, and other public places, have been in activity every where, though, perhaps, in a less degree than in this city and its faubourgs; and the law has provided for them. When the right to the soil, and the powers of police and city governments were united in the corporation, its legal administrators could alienate public things with the sanction of the supreme power in the State. When both were in the king, he possessed the authority without any legal restraint; and if he erred in the exercise of it, redress could only be had from him. It is true, that so long as the government preserved the destination for public use, neither

the whole, nor any part of it, could be the subject of contract between individuals; and it is in this sense I understand the various authorities referred to, which declare, that things public cannot be bought or sold. Such, it appears to me, is evidently the meanings of the passage in the Roman Digest, on which Domat lays down the general principle, that they are *hors de commerce: "Sed celsus filius, ait, hominem liberum scientum te emere non posse nec cujus cumque rei si scias alienationem non esse, ut sacra et religiosa loca, aut quorum commercium non sit, et publica quæ non in pecunia populi, sed in publico usu habeantur, ut est Campus Martius."* Though the field of Mars could not be an object of commerce, I apprehend we cannot safely deduce from this passage the doctrine, that the Roman Senate had not the power to dispose of the field as they thought proper. I understand the law quoted from the Partidas, in the same way; and I cannot gather from it that it was at all contemplated to limit the power of the king of Spain over public places. It merely declares, what I do not doubt is true, that so long as the thing is public, it cannot be bought or sold. Toullier tells us, that property of this kind is only inalienable so long as it preserves its destination. He further shows, that the modern law of France agrees with the ancient in respect to the rights of corporations. They cannot acquire any thing for their use without the express consent of the legislature. He divides the things of which they may become the owners into two kinds; one of which consists of public edifices, roads, streets, canals, &c. They may alienate this property by the same authority under which they can acquire, provided certain formalities are pursued. To the same effect is Domat. Among these formalities I cannot discover that it was necessary to have a law or ordinance passed, changing the destination, that appears to have resulted from the alienation itself, if made according to law. If a corporation, with the sanction of the supreme power in the State, could dispose of things destined to public use, of which they held the title, and by this alienation change their destination, I see no ground for doubting, that the sovereign in whom this authority to approve the sale was vested, in case the title was in the corporation, could also sell at his will and pleasure, when the right to the soil and the power to regulate the city, were both retained by him. This distinction between the public places, of which the property was in the crown and those which were not, appears to have been recognized by the Roman law. The edict, *ne quid loco publico vel itinere fiat*, we are told did not extend to things of which the property was in the sovereign. Individuals had nothing to do with them, and if any one erected works on them, redress was not to be obtained from the rector, but the prefects of the prince. The *third law*, of the *thirty-second title* of the *Third Partidas*, makes the same distinction; for it declares that no one shall build or erect works in streets or common grounds, without permission of the king or council, as the case may be, on whose ground he builds.—*Sin otorgamiento del Rey ó del concejo in cuyo suelo lo ficiesse. Toullier, Droit Civil Francais, liv.* 2., *title* 1., *chap.* 3.; *Nos.* 36, 40.; *ibid*, 49, 50, 51. *Domat, liv.* 1., *title* 2., *sect.* 8., *arts.* 5, 6. *Dig. lib.* 18., *title* 1., *l.* 6. *Ibid*, 43, 8, 2., *sect.* 4. *Partidas*, 5, 5, 15. *Ibid*, 3, 32, 3.

The principles which may be gathered from the writers on public law do not enable us to say, that any limitation vested in the power of an absolute monarch, which forbade the alienation of property, such as that which has given rise to this contest. *Grotius* and *Puffendorf* divide public pro-

perty into two kinds; one they denominate *national domain*, the other the *domain of the crown*. Of the revenues of the latter, the king, when he was absolute, might dispose at his will; of the former he had only the administration. Lands formed by alluvion fell into the first class which were left dry by a river changing its bed were considered as making a part of the revenues of the state, and subject to alienation by the king. Under which of these divisions, newly discovered lands which were occupied by savage nations, and obtained from them by conquest or purchase, would fall, it is somewhat difficult to say; but the inquiry is immaterial. The practice of all European nations which have acquired dominions on this continent, has been to consider them crown property, and as such susceptible of alienation by the sovereign. The kings of France, of Spain, and of England, have, as far as I am informed, granted and sold, and made donations of these lands, without having their authority to do so ever called in question. There is scarcely a title to land, in either North or South America, which is not derived from that source; and it is now by far too late to call it in question. If, then, the position, always assumed in relation to the right of soil in the sovereign, be true, and if it be also true, as I consider it is, that until a grant was made to the city, he had the power to alienate any portion of vacant land, not indispensable to the use and enjoyment of urban property, his authority over the *locus in quo* cannot be distinguished from that which he possessed over any other part of Louisiana. *Grotius on War and Peace, liv. 2., cap. 6., sect. 11, 12. Puffendorff, lib. 8., cap. 5., sect. 8, 11.*

The extent of the power of the king, then, under the view just taken, I think cannot be questioned, but as the argument which limits his authority over a place such as this, to acts of administration which may have public good in view, has made an impression it requires some further notice. That the power over the *locus in quo*, as well as other powers vested in an absolute. Monarch must be assumed in theory to have been surrendered to him; and should be exercised for the public good, I readily admit; but that there existed any legal limitation on the power from which a court of justice, either in France or Spain, could pronounce a grant such as this before us null and void, is what I feel unable to assent to. We have already seen, that according to the highest authorities, land left exposed by a change in the course of a river, made a part of the domain of the crown, and was subject to alienation. The inveterate practice of the sovereigns of Europe in relation to lands acquired on this continent has been noticed, and if any one principle can be established in relation to matters of this kind by a concurrent usage, it may be safely affirmed now, that these lands could rightfully and legally be alienated by the crown. This right strikes me to be in no manner inconsistent with the full admission that these lands, as a part of the domain of the crown, were given to it for administration and for revenue. The administration of waste and unsettled deserts could yield no revenue. Profit could only be derived from their sale or their settlement. Sale in the greater number of instance, was out of the question; for men in that early period could not be found in sufficient numbers to abandon the comforts and security of elder societies, and risk their fortunes and families in distant regions among savage nations. Strong inducements were therefore required to be held out, and these inducements were in general gifts of land. A discretion was necessarily conferred on the Government as to the mode in which these foreign possessions might be rendered valuable to

the State, and it cannot be doubted that that discretion was soundly exercised, in inviting settlers by making them donations of land. It was the only means by which the revenues of the crown could be ultimately improved, through the commerce which the colony might have with the mother country. When, therefore, in the exercise of an authority so legitimate and so long practiced the crown makes a grant, can a court of justice cross its path, check the bounty of the sovereign and declare the patent void, because the discretion vested in him was not wisely exercised? I am unaware of any tribunal ever having gone such a length. The grounds offered in this case may be very good, and such as should have prevented the grant being made. It is possible they were overlooked, and overlooked through negligence, and it may be admitted the case is strong enough to call on the grantor to compensate the grantee and revoke the grant. But the considerations on which such a conclusion could be obtained, and such a decree be made were for the sovereign. A court could not safely enter into the one, and has no authority to declare the other. Such objections, if received, would lead to interminable inquiries and end in the most unsatisfactory conclusions. One day the grant would be assailed on such grounds as are offered in this case; on another it would be attacked, because from the peculiar position of the property, or from increased value given to the land conceded by the settlement around it, it would have been wiser in the sovereign to have made it an object of sale. I know of no cases where a grant from the State can be considered void, except where the State has no title to the thing granted, or where the officer by whom the grant was made had no authority to issue it. To such cases alone do I understand the Supreme Court of the United States to confine the nullity. *Polk's lessee* vs. *Wendall*, *5th Wheaton*, 303. In a very late case where it was contended before that tribunal, that a grant of lands in Florida was void, because the Intendant had exceeded his jurisdiction, the court said, "he had the power to make the grant, the terms and extent of which were within his discretion, of the proper exercise of which we have neither the power nor right to judge. 6 *Peters*, 746.

It was said in argument, that the King could not make such a concession in this, and that still less could a colonial officer make it. The permission to settle in the present case was given by the Governor of Louisiana. Ever since the country was established, officers of this rank exercised the power both under the French and Spanish governments to grant lands, and the legitimate exercise of that power cannot now be questioned. The same object was taken in the case decided in the Supreme Court of the U. S. just alluded to, and the answer made to it expresses so fully my opinion, and in language so clear, that I shall quote it. "The grants of colonial governors before the revolution, have always been and yet are taken as plenary evidence of the grant itself, as well as authority to dispose of the public lands. Its actual exercise, without any evidence of disavowal, revocation or denial by the king, and his consequent acquiescence and presumed ratification are sufficient proof in the absence of any to the contrary, (subsequent to the grant,) of the royal assent, to the exercise of his prerogative by his local governors. This, or no other court, can require proof that there exists in every government a power to dispose of its property, in the absence of any elsewhere, we are bound to presume and consider, that it exists in the officers or tribunal who exercise it. 6 *Peters*, 728.

The case then stands before us as if the permission to settle had been

given by the king himself. The property belonged to the crown, and as such might be alienated unless we come to the conclusion, that although the town of New Orleans, for whose particular benefit it was said to be set apart, could not successfully assert a right or title to the use of it, without letters patent, all mankind might. The unwise exercise of the power vested in the sovereign, does not enable a court of justice to declare that the grant is null. Resting on these postulates, I look around me in vain for any safe ground on which the tribunal can assume the authority to decide, that the patent produced by the plaintiffs is void.

But this case may be considered on other grounds than the rights in, and power of, the sovereign over public places in cities where he has not made a grant of them, and I apprehend the result of the examination will be equally favorable to the pretensions of the plaintiffs. The real question here is, what power had the King of France over a piece of ground left vacant in front of the city of New Orleans when it was first laid out, which space, several years after that event, was represented on a plan made by the authority of Government as a quay? It cannot be made a question, that the king in laying out public places, may make an absolute or conditional gift of them, or that the right conferred on the public may not be qualified and incomplete. Equally true do I consider the proposition, that this limitation, where there is no express grant, may be sought for in the laws and usages of the country, or may result from the purposes for which the destination is made. Toullier tells us, that a destination to public purposes does not prevent the acquisition of individual rights, compatible with the use which the public has in the thing so destined. *Touillier, liv. 2, tit. 1, chap. 3, No. 40.* The right acquired by the plaintiffs under this grant, is not incompatible with the loading and unloading of merchandise from vessels, which is the use a quay is destined to, and the sovereign cannot be presumed to have surrendered any thing more, than that which was necessary for the enjoyment of the thing given.

The same conclusion can be obtained on other grounds. In the first place, unless we admit that words can make, or change things, the *locus in quo* cannot be considered a quay, or a part of one. The word *quay* in English, *quai* in French, and the corresponding terms *muelle, or mueco,* in Spanish, are defined by the best philologists and law-writers, as artificial works erected by man. No part of the ground, therefore, left between the city and the river, can be regarded as *quay,* save that which was prepared for the safe and more commodious reception and discharge of vessels, by the creation of the *levee,* or artificial embankment.

But, admitting that a place found within the limits of a city, which answers the purpose of loading and unloading vessels, without labor being bestowed on it, could be considered a *quay,* still the undoubted fact, that in by far the greater number of instances, these places were artificial works, shews, that it must be in the laws and usages, which establish the rights of the owners in relation to *them;* that those of the owner of the soil, which, in its natural state, serves for a quay, must be sought. The books make no distinction, and reason suggests not even a plausible ground for any. The right and title to the soil, cannot be regarded as less valuable, than the materials and labor, used in erecting a work of this description.

There is express authority in the Spanish law, in relation to the rights of those, who by artificial works make a port, (and he who erects a quay, necessarily falls within the same principle) and we learn by it, that no part of

the port belongs to the public, save that which is required to land, and to embark. "*Si el puerto de la marfuere fabricado per ingenio de hombre el edificio es del que le fubrical conforme in texto: mas el puerto es de todos por ser el agua comun.*" "If the port of the seas is made by the work of man, the edifice belongs to him who erects it, but the port belongs to all, that the water may be common." If the edifice, therefore, belongs to the individual, and nothing be common but the use of the water, it is difficult to see, on what ground the whole of it can be considered as destined to public purposes, when a portion of the work is sufficient for the enjoyment of that which belongs to the public. The facts found in the writers on the French laws, and the acts of that government, clearly in my opinion, sustain this distinction, and are utterly irreconciliable with the position, that all the works erected for a quay, or all the ground marked out as such, is destined exclusively to the public use, and unsusceptible of private ownership. In the year 1676, commissioners, under the authority of the French government, by ordinance, regulated the rights of the *proprietors* of quays in Rochelle, prescribed their duties, and established the rate of tolls.

In 1690, 1720, and 1759, there are ordinances of the king of France on the same subject, recognising the ownership of individuals of such places, and furnishing rules and regulations in regard to the houses built thereon. *Valin, vol.* 2, 449 *to* 477. Various ordinances passed in relation to the city of Paris, permit, or direct houses, to be built on the quays within its limits. *Traite de Police, liv.* 1., *tit.* 7, 102, *a* 106. If the whole of the places thus marked out as quays, were *places publiques*, common to all mankind, whence this individual ownership? and how came individuals to reside in houses erected on them? The most satisfactory explanation which can be given of such a state of things, appears to me this: that after the quay was erected, the public had a right to the enjoyment of a sufficient space of it to load and unload vessels, and the right to regulate the portion destined for their use; and that the rest being private property, the owner was permitted to appropriate it to his own advantage. If this be true, there can be no error in assuming that when the crown made the quay, or laid it out on lands belonging to the sovereign, his rights in, and authority over, the place, were not inferior to those of private individuals. They were indeed greater when the city was not incorporated, because to the ownership was joined the power of making regulations for the government of public places. By edicts of Charles IX, in 1566, of Louis XIV, in 1672, 1682, and 1708, quays, as making a part of the *petits domains*, were alienated; which is strong and conclusive evidence, that at that time, and in the opinion of these monarchs, and their advisers, it was understood that all places of this kind in cities, did not belong to corporations, and that they might be disposed of by the king to individuals. It is contested whether the thing itself was sold, or merely the *rights* which the king had in it; but this inquiry is immaterial, if it be true that in places of this kind erected by individuals, a power existed to appropriate any portion of them to private purposes, provided sufficient space was left for the enjoyment of that part which was dedicated to the use of the public.

The case was principally, though not exclusively, argued on the laws of France, and by these laws, I have thus far considered, it should be decided. If in the hands of that country, the ground in question belonged to the crown, it certainly passed to the king of Spain by the treaty of cession, and

he owned it, as it had been owned by the French monarch, unless the laws or political regulations of the former country changed its character, or limited the rights of the sovereign.

I have been unable to discover that any such existed. It has been already seen, by a law of the Partidas, that a *grant* was necessary, to render a place set apart for public use, common property of the city; and by another law contained in the same work, that the king might own public places, in a city, because *it* there is a prohibition to build on those which belong to him without his consent. The regulations made in relation to the Spanish dominions in America, strengthen the conclusion that the rights of the kings were the same in both monarchies. The 4th book of the *Recopilacion de las Judias, titles* 7, 8, 9, 12, and 13, contains many minute regulations as to the manner in which cities were to be laid out in the colonies. The first law of the 13th title of the 4th book has, however, a very clear expression of the policy of the monarchs of Spain on this subject, and contains a direct assertion of a power, in all respects conformable to that which I consider was possessed by the kings of France. By this law it is declared that the viceroys and governors, who have authority conferred on them to lay off towns, may designate lands, for their use, and *may grant them;* but that they shall send to the king a statement of what is thus designated and given, in order that it may be confirmed by him. *"Los vis reyes y governadores que tuvieren facultad senalen a cada villa y luego que de nuevo se fundare y publáre las tierras y salares que huviere menester, y se le podran clar, sin perjuicio de tercero para propios, y envien nos de lo que a cada uno huvieren señolado, y dado, para que lo mandemos confirmar."* It results from this law, that designation alone did not vest title, for after the designation is made, power is given to grant the lands to the city; a power wholly unnecessary, if the mere fact of laying the land off for the benefit of the community, conferred an absolute right to the use of it. The necessity of obtaining the confirmation of the king himself, before the grant or gift was complete, no doubt proceeded from the same reason which dictated a similar policy in France, namely, that when once given, the thing was put *hors de commerce.*

The laws found in the *Recopilacion* relative to the property of town in Spain, do not, in any respect, repeal the provisions already cited from the *Partidas*, which require title to exist in the city, before it can claim a right to the use of public places. The only modification they introduce, so far as I have been able to discover, is, that cities might acquire by purchase or prescription. From various enactments found in the compilation first named, it appears that rich and powerful individuals, the municipal officers, neighboring communities, and sometimes strangers, were in the habit of entering into and occupying the commons, lands, and other property, belonging to towns and communities. In many instances, the difficulty of obtaining possession and redress was increased by the usurpers having obtained grants of such places from the crown itself. Several of the laws complain that favor was shown by the courts to the persons thus entering on the common property of the cities, and, for near two hundred years, there appears to have been a constant struggle between the cupidity of individuals on the one hand, and the justice of the crown on the other, seeking to preserve to communities the property which belonged to them. *Noviscima Recopilacion, liv.* 7, *tit.* 21, *laws* 3, 4, 5, 6, and 7. The first law of the fifteenth title of the same book declares it to be the will and ples-

the port belongs to the public, save that which is required to land, and to embark. "*Si el puerto de la marfuere fabricado per ingenio de hombre el edificio es del que le fubrical conforme in texto: mas el puerto es de todos por ser el agua comun.*" "If the port of the seas is made by the work of man, the edifice belongs to him who erects it, but the port belongs to all, that the water may be common." If the edifice, therefore, belongs to the individual, and nothing be common but the use of the water, it is difficult to see, on what ground the whole of it can be considered as destined to public purposes, when a portion of the work is sufficient for the enjoyment of that which belongs to the public. The facts found in the writers on the French laws, and the acts of that government, clearly in my opinion, sustain this distinction, and are utterly irreconciliable with the position, that all the works erected for a quay, or all the ground marked out as such, is destined exclusively to the public use, and unsusceptible of private ownership. In the year 1676, commissioners, under the authority of the French government, by ordinance, regulated the rights of the *proprietors* of quays in Rochelle, prescribed their duties, and established the rate of tolls.

In 1690, 1720, and 1759, there are ordinances of the king of France on the same subject, recognising the ownership of individuals of such places, and furnishing rules and regulations in regard to the houses built thereon. *Valin, vol.* 2, 449 *to* 477. Various ordinances passed in relation to the city of Paris, permit, or direct houses, to be built on the quays within its limits. *Traite de Police, liv.* 1., *tit.* 7, 102, *a* 106. If the whole of the places thus marked out as quays, were *places publiques*, common to all mankind, whence this individual ownership? and how came individuals to reside in houses erected on them? The most satisfactory explanation which can be given of such a state of things, appears to me this: that after the quay was erected, the public had a right to the enjoyment of a sufficient space of it to load and unload vessels, and the right to regulate the portion destined for their use; and that the rest being private property, the owner was permitted to appropriate it to his own advantage. If this be true, there can be no error in assuming that when the crown made the quay, or laid it out on lands belonging to the sovereign, his rights in, and authority over, the place, were not inferior to those of private individuals. They were indeed greater when the city was not incorporated, because to the ownership was joined the power of making regulations for the government of public places. By edicts of Charles IX, in 1566, of Louis XIV, in 1672, 1682, and 1708, quays, as making a part of the *petits domains*, were alienated; which is strong and conclusive evidence, that at that time, and in the opinion of these monarchs, and their advisers, it was understood that all places of this kind in cities, did not belong to corporations, and that they might be disposed of by the king to individuals. It is contested whether the thing itself was sold, or merely the *rights* which the king had in it; but this inquiry is immaterial, if it be true that in places of this kind erected by individuals, a power existed to appropriate any portion of them to private purposes, provided sufficient space was left for the enjoyment of that part which was dedicated to the use of the public.

The case was principally, though not exclusively, argued on the laws of France, and by these laws, I have thus far considered, it should be decided. If in the hands of that country, the ground in question belonged to the crown, it certainly passed to the king of Spain by the treaty of cession, and

he owned it, as it had been owned by the French monarch, unless the laws or political regulations of the former country changed its character, or limited the rights of the sovereign.

I have been unable to discover that any such existed. It has been already seen, by a law of the Partidas, that a *grant* was necessary, to render a place set apart for public use, common property of the city; and by another law contained in the same work, that the king might own public places, in a city, because *it* there is a prohibition to build on those which belong to him without his consent. The regulations made in relation to the Spanish dominions in America, strengthen the conclusion that the rights of the kings were the same in both monarchies. The 4th book of the *Recopilacion de las Judias, titles* 7, 8, 9, 12, and 13, contains many minute regulations as to the manner in which cities were to be laid out in the colonies. The first law of the 13th title of the 4th book has, however, a very clear expression of the policy of the monarchs of Spain on this subject, and contains a direct assertion of a power, in all respects conformable to that which I consider was possessed by the kings of France. By this law it is declared that the viceroys and governors, who have authority conferred on them to lay off towns, may designate lands, for their use, and *may grant them;* but that they shall send to the king a statement of what is thus designated and given, in order that it may be confirmed by him. "*Los vis reyes y governadores que tuvieren facultad senalen a cada villa y luego que de nuevo se fundare y publáre las tierras y salares que huviere menester, y se le podran clar, sin perjuicio de tercero para propios, y envien nos de lo que a cada uno huvieren señolado, y dado, para que lo mandemos confirmar.*" It results from this law, that designation alone did not vest title, for after the designation is made, power is given to grant the lands to the city; a power wholly unnecessary, if the mere fact of laying the land off for the benefit of the community, conferred an absolute right to the use of it. The necessity of obtaining the confirmation of the king himself, before the grant or gift was complete, no doubt proceeded from the same reason which dictated a similar policy in France, namely, that when once given, the thing was put *hors de commerce.*

The laws found in the *Recopilacion* relative to the property of town in Spain, do not, in any respect, repeal the provisions already cited from the *Partidas,* which require title to exist in the city, before it can claim a right to the use of public places. The only modification they introduce, so far as I have been able to discover, is, that cities might acquire by purchase or prescription. From various enactments found in the compilation first named, it appears that rich and powerful individuals, the municipal officers, neighboring communities, and sometimes strangers, were in the habit of entering into and occupying the commons, lands, and other property, belonging to towns and communities. In many instances, the difficulty of obtaining possession and redress was increased by the usurpers having obtained grants of such places from the crown itself. Several of the laws complain that favor was shown by the courts to the persons thus entering on the common property of the cities, and, for near two hundred years, there appears to have been a constant struggle between the cupidity of individuals on the one hand, and the justice of the crown on the other, seeking to preserve to communities the property which belonged to them. *Novisima Recopilacion, liv.* 7, *tit.* 21, *laws* 3, 4, 5, 6, and 7. The first law of the fifteenth title of the same book declares it to be the will and ples-

sure of the king to preserve the rights, rents, and property of cities; that it was not his intention to grant them, and that, if he should, such grants were not valid. The succeeding law, of the same title and book, speaks of the property which belonged to cities, and makes enactments for better securing their enjoyment. The first law of the twenty-first title of the seventh book provides for things which cities may have acquired by purchase or prescription, and declares they shall not be dispossessed of them. The next law also relates to city property, and the same remark applies to the various other provisions found throughout this book. As almost all the towns in Spain, at the time of passing these laws, had acquired a title by prescription for long use, though they were originally without a grant, it is most probable the enactments just alluded to embraced all the community property in Old Spain. But in none of these laws, so far as I have been able to discover, is one syllable to be found respecting any other property but that belonging to cities; none of them speaks of that owned by the crown, and to which the community had no grant, or had acquired no right or title by prescription.

The prohibition contained in one of those laws, against officers deriving their authority from the king thereafter making grants, either of the property of cities or of any lands whatever, without license from the crown, I am of opinion, applies to commons and public places held by communities in Old Spain, under the circumstances already stated. The words of the law, indeed, authorize no other construction: *Los terminos, y proprios, y baldios, de los cindades y aillas de nuestros reynos.* The property which is common to cities, we have already seen, is that which is granted to them, or which they may have acquired by purchase or prescription. Such an enactment does not apply to property in a city newly laid off, where the king has not made a grant of the public places, or the community has acquired no title by prescription. But, admitting it applied to crown property, as well as that to which towns might have acquired a right by long enjoyment or otherwise, it cannot be understood as limiting the authority of Spanish governors in Louisiana. We have just as much reason for considering it not in force, in regard to the *locus in quo,* as we have in relation to other lands in the province, for the prohibition extends to all lands belonging to the crown; and the conclusion that the Spanish governors had no power to make a grant of crown property, lying within the limits of a city, in consequence of this law, must bring us also to the same result, in regard to all the grants of waste lands which were made by Spain, while she possessed the territory which now forms this State. For the reasons already mentioned, the power, and rightful exercise of that power, cannot now be questioned. And before this part of the subject is dismissed, it cannot escape remark, that this ordinance, which directs that grants should not be made of commons or other lands, *without license from the king,* is a clear recognition, *that, with his license and authority,* such grants might be made; and it will remain for those who sustain the proposition, that the patent from the general government is null and void, to show how the United States lost the rights over this place which the king of Spain had, and which, by the treaty of cession, they acquired; and how, if they lost their rights over this place, they retained them over the other public lands in the state. I will examine this part of the subject hereafter; at present I shall merely say, that I have been unable to bring my mind to the conclusion that their

right in the *locus in quo* was less complete than that of the kings of France or Spain.

The officers of the Spanish government, during the time it exercised authority in Louisiana, gave permission to individuals, in several instances, to settle on the space of vacant ground between the front street and the river, and to some of the settlers they issued grants. These acts on their part, no doubt, proceeded from their understanding of the laws being that which I have just stated to be mine. It was not until a very late period, that any opposition was raised on the part of the cabildo to the exercise of this power, and no decision was made on that opposition when the change of the government took place. But, in the year 1799, the intendant of the colony recognised the validity of these gifts, for notice was given in the general ordinance issued by him, in regard to public lands, to all those who had inchoate titles to any lots in front of the city, to present them, in order that they might be confirmed. There is nothing in the history of the government of Spain in Louisiana, to induce us to ascribe these acts to a wanton disregard of the rights of the city. Whether it arose from ignorance of their laws, the imperfect exposition just made of them may, perhaps, assist in determining.

But in opposition to the weight which may be attached to the opinions of the Spanish officers in Louisiana, in relation to the rights of the king over a public place, not granted by him to the city, it is proper to state, that, by a decision made by them, they considered, that when a private individual laid out a *faubourg*, and set apart a place for public use, he could not afterwards resume it. Their decision was appealed from, and the records filed in the superior court at Havanna; but owing to its not being carried there within the legal delay, this court, without entering into the merits of the case, held, that the first decree had passed into the authority of the thing judged. Whether this decision would have been found correct or not, under the laws of Spain, and would have been confirmed by the appellate tribunal, it is not very material to inquire, as it *lives* untouched all the grounds which have been already gone into so fully, respecting the rights of the sovereign over land of which he had not made a grant, or suffered to remain long enough in the use of the community to enable it to acquire a title by prescription. 11*th Martin*, 620.

My investigations, so far, having brought me to the conclusion, that by the laws of France its monarch retained the right to the soil, and the power of alienation of any land in a city for which he had not made a grant; and that the king of Spain, to whom his right was assigned, held it in the same manner, and possessed the same authority over it; the next inquiry is, whether the rights of the United States were co-extensive with those of the monarchs of these countries. By the treaty of St. Ildefonso, his Catholic Majesty retroceded to the French Republic the colony of Louisiana, as he had received it; and by this cession, there can be no doubt, the government of France was restored to all the public property originally ceded by her to Spain, which the latter had not alienated. In virtue of this cession, France ceded to the United States, for ever and in full sovereignty, (to use the language of the treaty,) the territory of Louisiana, with all its rights and appurtenances. By these expressions the ground in question passed, if it was public property. But the treaty itself does not leave this to inference, for by the 2nd article it is declared, that under the expression just quoted

are included the adjacent islands belonging to New Orleans, all public lots and squares, vacant lands, all public buildings, &c. &c., *which are not private property.*

The right and title to the soil of the *locus in quo*, which, it is admitted, was not private property, therefore passed to the United States. Notwithstanding this, I admit, that if the kings of France or Spain had surrendered their right to alienate it, by irrevocably dedicating the place to the use of the city, the United States could not grant it to a private individual. But it is equally true, it appears to me, that if the kings of France or Spain could have made the premises now in dispute the subject of donation to individuals, the United States have the same power.

But it is said they have lost the power by erecting the territory of Orleans into a State. The convention which formed the constitution of Louisiana, acceded to the terms on which Congress admitted us into the Union, and by an ordinance for ever renounced all right or title, not to the waste *and* unappropriated lands, but to the waste *or* unappropriated lands. This word, unappropriated, is not found in Johnson. Webster defines it: First, not appropriated, not applied or directed to be applied to any specific object. Second, not granted or given to any person, company, or corporation. I presume it is in the latter sense the word must be understood; for, if taken in the first, then the fact of the land having been applied to any specific object, a barrack, a fort, or fortification, would make the State of Louisiana the owner of such places. The lot on which the custom-house is erected would also belong to her. This I do not think was intended, nor has it been so understood. The State of Louisiana has given us her construction of the terms used, for she has accepted a grant from the United States of the government house in Levee-street, and the lot on which it was erected. The defendants themselves have furnished us with proof that they did not so understand the act admitting us into the Union; for they have acted under a grant from the United States as a part of the lot on which was situated the navy storehouse in New Orleans, to continue the street leading from Conde-street to the Market-house. *See Land Laws*, 611, 835. The meaning of both parties, it appears to me, was, that the State should renounce all claim to lands to which individuals or corporations had not a title. Let the case be examined as it may, I believe we are compelled to return to the main question—could the *locus in quo* have been granted to individuals by the monarchs of France and Spain?

I have not, in coming to my conclusions, been much influenced by the facts relied on in argument, that since the change of government the corporation have applied for, and obtained from Congress, laws vesting a title in them to the commons laid out for the use of the city, and that they also in the same way got a title from the United States, of a lot lying between the front street and the river, within that space of ground which it is now contended the General Government has no right to alienate, because I do not think these applications operate as an estoppel to the assertion of any title which they really have. Acts such as these would be of some importance in showing the understanding of both parties, in regard to the question now contested, were it not that, at the time these laws were passed, there is every reason to believe the corporation was ignorant of the existence of a plan on which the ground in question was designated as a quay.

Some minor questions remain to be disposed of. The fact of a street or public way being laid out by the corporation since they took possession of

the lot, cannot, I think, impair any right which the plaintiffs had in the premises before such street was made. The corporation of New Orleans has no power to turn the owners of lots out of their possessions, and convert their property into streets, without at least making them compensation. Whether they have authority to do so, even on making that compensation, need not now be inquired into.

The title by prescription is not sustained. The laws of Spain required forty years' possession in a community. From 1769, when that country acquired title to Louisiana, to 1831, is sixty-two years; during twenty-four of these the *locus in quo* was occupied by the plaintiffs, or those under whom they claimed. This leaves but thirty-eight years for the possession of the city.

And as to the right supposed to arise from the establishment of a cabildo, and the incorporation of a city, it may be disposed of by stating, that acts of incorporation may confer a capacity to acquire, but do not in themselves operate as a transfer of property.

Another ground was taken by defendants which requires notice. It was said that the authority which the kings of France or Spain could exercise over such places, if in truth it could be at all exercised, arose from the union in the sovereign of title and right to regulate the police of the city, and that the latter power having been transferred to the State of Louisiana, by the act of Congress erecting her into a State and admitting her into the Union, the United States could no longer dispose of the soil. To what weight this argument might be entitled, in a case differently circumstanced from this, it is superfluous to examine. For here the Spanish government, in which both right of soil in and power of control over public places were vested, gave the possession to Bertrand, and the United States, supposing nothing to have remained to them but the right of soil, have granted that.

To conclude, then, I am of opinion:

1st. That by the patent produced from the government of the United States, all the right, title, and interest which they had to the *locus in quo*, vested in the plaintiffs.

2nd. That the inscription of the word *quai*, on a plan of the city of New Orleans, found in the archives of the French government, did not vest title either to the soil, or to the use of it, in the inhabitants of the city.

3d. That this plan does not establish a designation to public use of the whole of the place marked as a *quai*, which prevented the sovereign of either France or Spain from afterwards appropriating it to his own use, or to that of others. All designations of this kind in either country, leaving the property so designated, (unless it was indispensable to the enjoyment of urban property,) subject to the disposal of the monarch, unless he afterwards granted it to the town or community where the place was situated, or that they had possessed and used it a sufficient length of time to acquire a title by prescription.

4th. That if the power of the sovereigns of those countries was more limited over public places than I have concluded, still it would be rightfully exercised over any part of the space in front of the city not necessary to be used as a quay.

5th. That the city has shown no title by prescription, none by converting the lot into a street, none by the acts of incorporation, and none by the erection of the territory of Orleans into the State of Louisiana.

The importance of the case and the intrinsic difficulties which attend its decision, will explain, in some measure, the unusual, and perhaps too great

length, of this opinion. After all that may be said, the difference of opinion in the members of this court will, perhaps, be found to arise from the opposite views entertained of the powers of the kings of France and Spain. They who feel unable to divest their minds, while considering this case, of the principles of our government, or even of those of that European state which once possessed and owned the larger portion of the country which is now the United States, will perhaps conclude that limitations existed on the authority of the Spanish and French kings, which disabled them from alienating property situated as this was. Such a conclusion cannot but be respected, when we reflect on the considerations by which it is obtained. But the lessons which teach it were not taught, I am afraid, in those countries at the time when these transactions took place, and cannot now be learned from their laws. Be the abstract attractiveness of such a doctrine what it may, the duty is devolved on us to decide, not what ought to have been the power of these monarchs, but what it actually was; and for reasons already given, I think they had such a power, and that we are compelled to recognise it.

It is, therefore, ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Afterwards, to wit: on Monday, the 18th of February, in the year of our Lord one thousand eight hundred and thirty-three, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

CHRIST'L G. DE ARMAS, AND M. S. CUCULLU, appellees, *vs.* THE MAYOR, ALDERMEN, &c., of New Orleans, appellants. } 2,320.

On motion of George Eustis, esqr., of counsel for the defendants, it is ordered, that the time for filing a petition for a rehearing in this case be extended until three weeks.

Afterwards, to wit: on the 27th day of March, in the year of our Lord one thousand eight hundred and thirty-three, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

ESTATE OF W. CREVON, deceased, wife of J. B. LA COUR, J. B. VIQUIE, appellees, *vs.* M. BLACHE, regr. appellant. } 2,408.

It is ordered, that the rehearing prayed for in these two cases, be refused.

CHL. G. DE ARMAS AND M. S. CUCULLU, appellees, *vs.* THE MAYOR, ALDERMEN, &c., of the city of New Orleans. } 2,320.

I, N. B. Le Breton, clerk of the Supreme Court of the eastern district of Louisiana, do hereby certify, that the foregoing one hundred and nine pages contain a full and complete copy of the record in the case of C.

G. de Armas and M. S. Cucullu, against the mayor, aldermen, and inhabitants of the city of New Orleans, and of all the evidence, documents, and proceedings in said cause. Given under my hand and the seal of the said Supreme Court for the eastern district of Louisiana, at New Orleans, this twenty-eighth day of June, one thousand eight hundred and thirty four.

[SEAL.] N. B. LE BRETON, *Clerk.*

I, George Mathews, presiding judge of the Supreme Court of the State of Louisiana, sitting in and for the eastern district of said State of Louisiana, do hereby certify that N. B. Le Breton, whose name is signed to the above certificate and attestation, is and was at the time of signing the same, clerk of the Supreme Court for the eastern district of the State of Louisiana; that the signature is in his own proper handwriting, and that his attestation and certificate is in due form.

GEO. MATHEWS. [SEAL.]

NEW ORLEANS, *June* 28, 1834.

UNITED STATES OF AMERICA, *Supreme Court E. D., State of Louisiana.*

Copy of the petition for a rehearing filed on the eleventh of March, eighteen hundred and thirty-three.

M. S. CUCULLU AND CHRIST'L. G. DE ARMAS, *vs.* THE MAYOR, ALDERMEN, AND INHABITANTS of the city of New Orleans. } To the Judges of the Supreme Court.

The object of the present application is to obtain from the court permission for a new argument at bar. In no case ever presented to the consideration of the court, have more important principles been involved than in the present. The length of time which this cause has occupied the attention of the court; the various questions of law elaborately discussed by the learned counsel for the plaintiffs, most of which have been for the first time examined before this court; the dissent of a learned judge, who, from his origin, language, and education, may be supposed to be familiar with the jurisprudence of the country according to which the opinion of the court has been formed; the important questions relating to the sovereign powers of the State and of the United States, which it is believed are inseparable from the merits of this cause, combine to produce the conviction that the cause will not be ultimately decided without the most deliberate and mature reflection.

The undersigned is encouraged in the unpleasant, and, what would be otherwise a hopeless task, of pointing out what he conceives to be errors in the opinion of the court, by the sense of justice which he is persuaded animates and influences the minds of those he addresses. He makes no apology for the length to which these remarks are extended, as it is necessarily caused by the numerous topics which the elaborate research of the learned counsel for the plaintiffs and the court have brought under investigation as pertinent to this case.

This is a petitory action. The plaintiffs must recover on the strength of their title, which they have set forth adversely to the defendants, whom they charge to be in possession of their property. It is incumbent there-

fore, on the plaintiffs, to establish the legal title which they have seth forth in their petition, on which they seek for a recovery. It is intimated that the objection to the plaintiff's title can only be made by those who claim under the United States, or some of the former governments of this country. But do not the defendants claim under the authority of the previous government of Louisiana? Is not their claim set forth and formally discussed by the court, in the opinions of the judges, as emanating from the authority of the government of France? Is it not expressly stated in the answer? And, if the defence to the action be available to any one, *it is* not available to the defendants under the positive decisions of this court? "If they, the present defendants, represent all the inhabitants, then they can avail themselves of the rights of each of them, so far as they support the public claim." 12*th Mart.* 624, *vide Partida* 3, 32, 3, *Dig. lit.* 43, *tit.* 7, *Sex.* 1, 15, 16, *Rodriguez, page* 331, *Lou. code article* 853.

The grounds upon which courts of justice in the United States have exercised the power to inquire into the validity of a patent, are:

1. If it appears to be absolutely void on its face.
2. When the issuing thereof was *without authority.*
3. When the issuing was prohibited by statute; or the United States had no title to the property granted.

The defendants contest the validity of the plaintiffs' patent on all these grounds.

They insist that the government of the United States had no authority to issue the patent under either of the laws recited in it, or the act of the 11th May, 1820, referred to in the plaintiffs' petition; and that at the time of issuing the patent the title to the soil was not in the United States. In former times, and under monarchical governments, letters patent emanating from the monarch were instruments of the highest dignity. But under our institutions, they are merely the emanations of the law. If they are unauthorized by law, they are a nullity. The sign manual of the executive officer can give them no effect which the law itself does not authorize. The act of signing a patent by the president of the United States, is only binding if authorized by law; otherwise, it is worth as much, and no more, than that of the humblest individual in society. From the earliest history of our government, letters patent were issued by the different states for vacant lands. Often it has been the case that two patents have issued for the same tract of land, and in other instances without the proper entries or location being first made. In these and other cases, it became necessary to inquire into the validity of the patents issued thereon. The subject has been thoroughly investigated before the judicial tribunals of the country, and the law is now perfectly settled. *See* 11*th Wheaton* 380, *and the cases there cited.*

The first point to which the attention of the court is solicited, is of the greatest importance to a correct decision of the cause. It is so considered by the court, and is the first premise laid down by both the judges in their opinions. It is considered, as it is in fact, the basis of the plaintiffs' title.

The presiding judge begins by stating that "the evidence of title adduced on the part of the plaintiffs are: 1st. *A permission to build and occupy the lot in question, granted by competent authority in the year* 1788, whilst Louisiana was a province of, and under the government of the king of Spain, to Thomas Bertrand.

He considers the title subsequently acquired as a "confirmation of that which they had obtained from the Spanish government. The right which they acquired from the sovereign of the country, and which seems to be the basis of the grant from the United States, was, as is shown by the evidence of the cause, *a permission to build on and occupy the lot of land in question.*" "That the plaintiffs are standing in the situation of persons claiming property *under a grant of the Spanish government as the basis of their title.*"

The junior judge commences with a similiar proposition. He says, "the plaintiffs are assignees of the heirs of Thomas Bertrand, deceased, who, in the year 1788, obtained from the then Governor of Louisiana, *permission to settle, and erect a house on the locus in quo.*"

Before the commissioners, he claimed "the lot in virtue of a permission to settle, and settlement in conformity therewith." *The permission to settle, in the present case,* was given by the Governor of Louisiana."

"This case, then, stands before us as if the *permission to settle had been given* by the king himself." "Resting on these postulates," (the first and most important of which appears to be that stated,) "I look around me in vain for any safe ground on which this tribunal can assume the authority to decide that the patent produced by the plaintiffs is void."

It is this postulate, this basis of the title, which is now contested; and it is asserted that there was no permission ever granted by the Spanish government to *settle* on the *lot* in question, or the *locus in quo*, or whatever it may be called, or to occupy it, or any reference to its present dimensions. The words *settlement* or *occupation*, are not used in the permission, nor is a lot or space as such mentioned or designated; and the terms of the permission exclude the idea of settlement in the sense in which it is used by the court, and which it has in our jurisprudence. Here are the proofs—the origin of the plaintiff's claim.

"*Petition.*

"*Señor Governor:* Antonio Beltran, an inhabitant of the city, states to your grace with the most profound respect, that the house which he inhabited having been burned on the 21st of this month, and having no place to take refuge in, he has determined to build a little house in front of that of Mr. Bienvenu; therefore, he earnestly begs that your grace would deign to grant him permission for what he asks: a favor which he expects from the goodness of your grace.

"NEW ORLEANS, *28th March*, 1788.

"Como lo pide—as is requested.

"MIRO."

"*Petition.*

"*Señor Governor General:* Thomas Bertrand, a *cabaratier*, of this city, states to your grace, with the most profound respect, that three months ago, he presented a memorial to your grace, begging that you would grant him permission to rebuild a cabin, (cabano) or little house, which he has fronting the levee, and in front of the house of the senor auditor of war, in consequence of the timbers of the said house having rotted, by reason of the excessive rains, and having lost the few clothes, or effects, which belong

to himself and his children. For this reason, and because the roof is about to fall in, he earnestly prays your grace, through your well known kindness, to give him leave to rebuild said house, since it is exposed to further ruin from the condition of the materials; a favor which he expects from the great kindness of your grace, whose important life may it please God to preserve many years.

(Signed) "THOS. BELTRAN.

"NEW ORLEANS, 17*th June*, '94.

"NEW ORLEANS, 16*th June*, 1794.

"*Granted*—but the same dimensions which the present house has, are to be preserved.

(Signed) "THE BARON DE CARONDELET."

Here we find a permission to build a small house in front of that of Mr. Bienvenu, for a shelter in a time of public calamity, after an occupancy of which for six years, the tenant did not believe he had a right to rebuild his cabin, in order to protect his moveables, without a new permission to that effect, transformed into a permission *to settle and occupy a lot*, of the dimensions of the one in question. Would a permission to build a cabin, or a little house, on a public place, or in any part of the port of the city, under similar circumstances, granted by the city authorities, or by a proprietor, on any part of his estate, be considered as tantamount to a permission to settle and occupy the lot which the tenant might, for his convenience, enclose? does not the language and conduct of the tenant repel, in express terms, the construction of the court, and shew the complete absence, in his breast, of the *animo domini*, and that he considered himself entirely destitute of any rights in relation to the lot, and relied, for the purpose of shelter for himself and his effects, entirely on the mercy of the governor.

The defendants have no interest in contesting the occupancy of the lot in question, by the plaintiffs, during the time stated in the depositions of the witnesses; but they contest the right to set up a claim under this permission. They contend that, under the permissions of the governors, no right was conferred in reference to the lot; that no right of settlement was asked for, or granted; and that the instruments set forth are conclusive on this subject. The terms *settlement*, *to settle*, *settlement rights*, are used in the statutes of the United States, and in that part of our jurisprudence which relates to the land laws. They imply *permanency*, when used without any qualification. The tenure of the tenant was temporary, precarious, and according to his own understanding, as evidenced by his acts, did not even confer on him the right to rebuild his dilapidated cabin, without permission, as before stated.

The defendants consider that the court has fallen into an error of fact as to this matter; that if the question were put to the country, whether the permissions given by the governors, Miro and Carondelet, were, or were not, permissions by their terms to *settle and occupy*, the lot in controversy, it could but be answered in the negative; that on this question of fact, the court has decided contrary to evidence, and that this postulate, this basis of the plaintiff's title, of which the subsequent acts of the government of the United States are confirmative, is totally inadmissible.

The objection now taken goes to the foundation of the plaintiff's title.

Because the court has considered all the subsequent acts of the government as confirmative of the rights of the party set up under this permission.

2d. There is a matter of fact connected with that under consideration, which the judge, who dissents from the opinion of the majority of the court, has discussed at length, in his opinion—the report on the claim by the land commissioners. This is assumed in the opinions of the majority of the judges, notwithstanding the commissioners declared they had *no authority to decide on it;* and by the instructions from the Secretary of the Treasury, they were specially notified that under the laws they were acting, their jurisdiction did not extend to town lots. What was done beyond their jurisdiction, and under a disclaimer of their own authority, can scarcely be considered as legally done. The views taken by the dissenting judge of this matter, and his expositions of the statutes under which the patent purports to have been issued, cannot fail to have their weight with the court, and to them the court is particularly referred on this branch of the subject.

3d. There is another question of fact upon which the defendants believe the court erred. It is stated, in the opinion of the junior judge, that the right "acquired by the plaintiffs under this grant, is not incompatible with the loading and unloading of merchandize from vessels, which is the use a quay is destined to." Part of the lot in controversy is on the public street; the rest is between the street and the river, but is covered by the levee which was constructed in 1822. *Vide testimony of Pilié, city surveyor.* It may be considered to be in about the centre of the port: the street proximate is the great thoroughfare of the city. The two markets between which the lot is situated, and the narrow space between the front row of houses and the river, render this spot one of the most frequented in the city, and it is believed, that if it were covered with buildings, no one acquainted with the localities, could be found to assert that the loading and unloading of merchandise from vessels fronting that spot, could be effected without great inconvenience; and if the right which the court has recognized to exist in the Government of the United States, be exercised in relation to the space similarly situated with this lot, that is, between the front street and the river; if it be granted to individuals, and they exercise the unlimited rights of property on it, the river would be shut out from the street, and the present uses of the levee and river must be abandoned.

On this matter of fact there ought to be no difference of opinion. The present destination and use of this property certainly show that it is required for public use. But let the court exercise a right which courts and juries are authorized to exercise; let them view the premises; let any man place himself on the spot, amid the present activity that reigns throughout our port, and the evidence of his own senses must satisfy him that the public convenience, the purposes of a quay, cannot be attained there, if it be incumbered with buildings, or if any obstructions be placed to a free communication between the street and the river; because a direct communication between the street and the river could not be had; but it would be necessary to go round the lot from the street, in order to get to the river in front of the lot, or to approach it on the levee, on which drays are prohibited, by necessity, from passing.

On this point, the attention of the court is requested to the important circumstance, that the fact of the spot being necessary to the purposes of a quay, to wit: of loading and unloading merchandise from vessels, is not negatived by any allegation in the petition; but it is said that "the defen-

dants have taken possession of it under the frivolous pretence that the said premises were or made part of certain quays which are figured on a map, said to be the original map of the city of New Orleans, and have enlarged the levee in front of the city so as to embrace the lot of ground aforesaid, and pretend, without any just or legal title or right, that the said lot of ground belongs to them."

Under the view of the subject which the court has taken, the defendants could safely admit the premises and the conclusion to which the court has arrived, provided this question, one purely of fact, be left open; that is, provided it be left to be ascertained by any legal means whether or not the uses and purposes of a quay would or not be destroyed by the application of the property to private use and occupation.

This is a question of fact which the court has determined without evidence. The testimony against the position consists of its present destination and occupancy since 1822, by the street and levee. It is believed that a further examination will lead the court to a different conclusion.

4. The attention of the court is called to another matter of fact, which is stated in the opinions under consideration in such a manner as to decide an important question of the case almost entirely by the effect of the terms made use of. The spot in controversy is said to be *part of vacant land—ground left vacant, &c.* If by the term *vacant land* being applied to it, it is intended to bring it within the land laws of the United States, the application is incorrect under the jurisprudence of the United States: for both by legislation and the decision of their courts, as well as by the positive instructions from the head of the department charged with the administration of the public lands, (a man whose knowledge of the subject was so thorough that he prepared, under the direction of Congress, a compend of these laws,) the statutes of the United States concerning the public lands do not refer to town lots. The object of this suit is claimed and described in the petition as a *lot;* it was surveyed and entered before the commissioners as *a lot of ground situated* in the city of New Orleans, who reported that they had *no authority to decide on it*, being instructed that their jurisdiction did not extend to lots in towns or cities. The acts of Congress under which the patent was issued, and their whole contexts relate *to lands.* The terms used and the conditions imposed exclude the possibility of their having any rational application to town lots. The patent in express terms recites: "that Catharine Gonzales, formerly the widow of Thomas Bertrand, having deposited in the general land office a certificate numbered one of the register of the land office at New Orleans, whereby it appears that in pursuance of an act of Congress, passed the 2d of March, 1805, entitled "an act for ascertaining and adjusting the titles and claims to *land* within the territory of Orleans and the district of Louisiana;" and in pursuance of an act of Congress passed the 12th of April, 1814, entitled "an act for the final adjustment of land titles in the State of Louisiana and Territory of Missouri," the said Catharine Gonzales is confirmed in her claim for a lot of *land* in the city of New Orleans, fronting on the levee, containing a superficies of 3176 feet and four inches in a square form, and bounded on the N. E. by the property of Domingo Gonzales, on the N. W. by the main road, and on the S. W. by *vacant lands*, and on the S. E. by the levee aforesaid."

Had the patent followed this description it would have been void on its face, because it would have been evidently and palpably without the statutes

which authorized the confirmation of titles to lands, and which have been shown not to mean town lots in the legislation of the United States; the patent not having followed the statute, "*subject to the provisions of which* it was issued." This limitation being embodied in it, the description must, therefore, be made to suit the statute. Hence, we find that all at once this lot, in the city of New Orleans, is, by an abuse of power rarely met with in our government, attempted to be transformed into a *tract of land.* The patent then goes on and says: "There is, therefore, granted by the United States unto the said Catharine Gonzales, (subject to the provisions of the act last named,) the *tract of land above described*, to have and to hold the said *tract with the appurtenances*," &c. The court cannot fail in an inquiry like the present, to see the injustice of *assuming it to be vacant land,* or *a tract of land* in the sense stated.

It is assumed also by the court, that the space was left *vacant* when the city was formed, and that the plans were made afterwards. The junior Judge says: "In my judgment *the proper inquiry* is, what power the sovereign, in whom the right of soil exists, has over a space of ground left vacant when the city was laid out, which was afterwards designated on a plan as a quay." The admissions on record in relation to the plans, it is believed, were not sufficiently weighed in stating this proposition in such general terms. Is there any evidence that, when the city was laid out, this space of ground was left vacant? For here the word vacant is applied with much exactness, in contradiction to its appropriation as a quay. Is there any evidence on the subject, except the plans and the history of the times? Is there any plan of *earlier date* than those in evidence, on which the space is vacant or unappropriated to public use? The site of the city may have been fixed before the dates of the plans; it certainly was. The first establishments were certainly in conformity with these plans, so far as it relates to the front of the city. They may have been prepared, and the first houses built on the streets before they were published by the government. The plan of Brontin, as it is noted, was not made by him. It was drawn by Gonichon, at a time not stated, but certified by Brontin in 1728. The other plan is dated in 1724. They are admitted to be the most ancient plans found in the archives of France, and are considered evidence of what were public places from the foundation of the city.

The presiding judge says, "I do not think the bare circumstances of its having been left vacant in the plan, suffices to give this character to that space of which it made a part." Can it be said with propriety, that a spot is left vacant in a plan, when by the plan it is designated as a public place—*eo nomine?* Can the streets be said to be vacant, or, indeed, can the word be applied, in the sense used, to any thing that is appropriated to the use of the public?

4. The next point which is presented to the consideration of the court, is the principal one of the cause. Is or not the spot in question a public place, that is, a place of which the public has the use and enjoyment?

It by no means follows under our laws, that, because the title or property may be vested in one person or political body, the use may not be in the public. The banks of rivers, levees, and the public roads along the rivers, belong to the ussarian proprietors, but the use of them is in the public. *L. E.*, 446. *Civil Code, p.* 96, *art.* 8.

They may be alienated, and are constantly sold as accessions to the principal estate, without impinging on the rights of the public, which remain

entire. Nor does it by any means follow, that, because a public place has been once constituted, so it must remain under all changes of circumstances, and amidst the convulsions of nature. The public use exacts nothing of the kind. It requires that as long as there are no changes which affect its natural condition, and as long as public convenience required it to be left to its original destination, and its appropriation to private purposes would violate other public rights, or render their enjoyment inconvenient and precarious, public places should remain open. The sovereign power, (and where that power in Louisiana is vested will be afterwards considered,) undoubtedly as it is charged with the protection of the rights of the public, is vested with the means of providing for exigencies of this kind.

Nor does it follow, that because this sovereign power exists in the cases stated as a necessary consequence of the social compact, without which public property would become useless, and private property could not be enjoyed, that public places, streets, and quays, necessary to public use, can be sold, or that any public right can be impinged.

The first piece of evidence in support of the right of the public in the plan of the city, made in 1724 and 1728. The suppositions and reasons stated by the court, for which this latter plan was made, may or may not be true. After a lapse of an hundred years, it is hardly safe to indulge in conjecture, when we have facts before us, and when the law itself furnishes the presumptions which follow from these facts. It is said, "that it was never delivered to the city as a *muniment of title*." Who knows that? Or if it were delivered, it is surprising that a century should have done its work with the document, as it has with every thing else in Louisiana, except the soil and the eternal Mississippi.

Mr. Jefferson observes: "That no formal written act of authorization can be produced is not singular, as that is known to be the condition of a great proportion of their titles from the government, and the extraordinary negligence in these titles was what rendered it necessary for Congress to establish in the several territories of Orleans, &c., boards of commissioners to ascertain and commit them to record." *5 Hall's Law Jour. 2.*

The majority of the court say, the "existence (of the original plan) *appears* to have been unknown to the corporation until quite a recent period."

Those who have been entrusted with the government of the corporation may not have known of its existence, but can any inference be justly drawn from thence adversely to the public rights?

We know that the city was built according to that plan, which, after this lapse of time, is some proof that it did not remain a dead letter in the archives of the colonial department. The plan was carried into effect under the French government; the contract was then performed (and it is by far too late to question its existence,) which bears the impress of time and truth.

But where is the law requiring the plan to be delivered in order to give it effect? Not surely the common law. Where is the rule found which renders the delivery of a plan necessary? It creates a public right in favor of all persons present in the country as inhabitants and sojourners. To whom is it to be delivered? It does not purport to give the city a title, but to confer on all a public right. Its proper place certainly is that in which it would be preserved in safety, in which the government might be sure it could not be altered. Indeed, the court has furnished the best possible

reason for its being in the custody of the officers of the crown, because they say the king retained the power of making regulations for the government of public places

The rule on this subject, as laid down in *Starkie on Ev., vol.* 1. *p.* 169, contains all that is deemed necessary in support of this part of the case: "It is, in general, essential to the reception of ancient instruments of this kind, and, indeed, of all others, whether they be of a public or private nature—such as public surveys, inquisitions, or ancient deeds, that the authority of the document should be established by the only kind of proof of which it is, in general, capable; that is, by proof that it came out of the proper repository."

In the record it is admitted expressly—1st. "That there existed a long time before the French revolution, an office, or bureau, attached to the department of marine and the colonies, at Versailles, in France, in which were deposited the manuscripts of all the plans of the cities founded under the authority of the French Government, in its colonies." 2d. "That the plans of New Orleans, the one made by *Dupanger*, in the year 1724, and the other by *Brontin*, in the year 1728, which were produced by the defendants in this case, are the most ancient plans of said city which were found in the said deposite." 3rd. "That the said *Dupanger* and *Brontin*, were both engineers for the king of France, and employed as such, in Louisiana, at the time they made the aforesaid plans." It therefore appears unquestionable, that the plan in evidence emanated from the proper authority, and that it was deposited in its proper place, to wit, in the department of the colonies of the mother country.

Another deduction follows from the foregoing admissions. The plan being found in the bureau in which were deposited the manuscripts of all the plans of the cities, founded under the authority of the French Government, in its colonies, is it not an inference which carries conviction to the mind, that this is the plan of a city founded under the authority of that government, and, consequently, that the city of New Orleans was founded on that plan, and the highest sanction given to it? There are some matters which it may be material to refer to, before the effect of this plan is considered. They belong to history, and it is believed, have an important bearing on the cause. It would be true, that the appropriation of this spot to private purposes, would not be incompatible with all the uses of it, as part of a quay, or of the port, provided New Orleans had remained in the condition in which she was at the time of the permission to build, given to Bertrand. Her population, in 1785, was 4,980 souls. 2 *vol. Martin's History*, 77. Her commerce, manacled by the colonial laws of Spain, required but little space for the purposes of a quay. How different was the state of things in the beginning of the last century. To be sure, every thing was prospective, but, in the imaginations of Europeans, Louisiana was to realize the most extravagant ideas of wealth and prosperity. They were a century out of the way in their calculations, but it is evident, according to the best historians, that every thing in relation to Louisiana was based on the grandest scale of successful enterprise. A new empire was to be founded; of its commerce, the most powerful corporation that ever existed was to have the monopoly, and of which, New Orleans was to be the mart and capital.

The western company was chartered in 1717. The charter was surrendered by the company in 1732, and, says the historian, "it cannot be denied that

while Louisiana was part of the dominions of France, it never prospered but during the fourteen years of the company's privileges."

Voltaire, in his *Essai sur le mœurs et l'Esprit des nations, part* 2, *ch.* 151, after speaking of the extravagant expectations formed of the wealth of Louisiana, says: "*a plan* of a magnificent and regular city, named New Orleans, was engraved."

It remains to consider the effect of the plan in evidence. The defendants have contended that this plan, if, as the court maintain, it does not vest the *title* in the defendants, vests the use of the port, the streets, and the public places, in the public, which every one has a right to enjoy, without impediment or hindrance.

The legal effect of a dedication to public uses of this description, has undergone a most elaborate examination in the Supreme Court of the United States, in two cases, of property situated between the first row of houses and the river, in the cities of Cincinnati and Pittsburg.

The junior judge states, in his opinion, that these doctrines would require considerable limitations and restrictions before they would be conformable to the laws of France, or Spain, which govern this case. That these principles are irreconciliable with certain principles of those laws. But it is respectfully submitted, that the Supreme Court consider the destination to public uses as tantamount to a grant of the highest possible authority which can emanate from the grantor. If the grantor was the king, the plan would be, for all purposes of destination of public places, a grant, or authority, equivalent to the most formal instrument. In relation to the power of the sovereign over public places, that is a question of prerogative which, of course, depends upon political institutions. The defendants are endeavoring now to show that a public place, a quay, was established by the plan of the city. The question of its inalienability will be afterwards discussed. The decisions referred to, as they are understood by the undersigned, applied to the present case, would not make the space called the quays inalienable, unless quays, by the laws of the realm, were inalienable; but they would make it a quay, as a matter of contract between the king and the public. It is in this light, that the judge who delivered the opinion in the Cincinnati case, states the reasons in which the judgment of the court is founded. The court there, say, that in dedications of land for public purposes, "the law applies to them rules adapted to the nature of the case, and to carry into execution the intention and object of the grantor, and secure to the public the benefit held out, and expected to be derived from, and enjoyed by the dedication."

"It was admitted at the bar, that dedications of land for charitable and religious purposes, and for public highways, were valid without any grantee, to whom the fee (or title) could be conveyed. Although such are the cases which most frequently occur, and are to be found in the books, it is not perceived, how any well grounded distinction can be made between such cases and the present. The same necessity exists in the one case as in the other, for the purpose of effecting the object intended. The principle, if well founded in law, must have a general application to all appropriations and dedications, for public use, where there is no grantee in *esse*, to take the fee. But this forms an exception to the rule applicable to private grants, and grows out of the necessity of the case." "*The right of the public to the use of the common, in* Cincinnati, must rest on the *same principles as the right to the use of the streets;* and no one will contend, that the original owners, after having laid out streets and sold building lots thereon, and im-

provements made, could claim the easement thus dedicated to the public.'' "It was for the public use, and the convenience and accommodation of the inhabitants of Cincinnati; and, doubtless, greatly enhanced the value of the private property adjoining this common, and thereby compensated the owners for the land thus thrown out as public grounds." "And after being thus set a part for public use, and enjoyed as such, and private and individual rights acquired, with reference to it, the law considers it in the nature of an estoppel *in pais*, which precludes the original owner from revoking such dedication. *It is a violation of good faith to the public, and to those who acquired private property with a view to the enjoyment of the use, thus publicly granted.*" 6. *Peters*, 431–57.

It is considered that there can be no discrepancies between the systems of jurisprudence on this point, because all that the defendants contend for, under these decisions, is, that the space designated as a quay, was so constituted by the plan, leaving the question of the control of the sovereign over it, to depend entirely on the royal prerogative, under the laws of France. The force and reason of the opinions cited, appear to have had their weight upon the junior judge. He says, "if the case was to be decided by the books referred to in the former system, I am not prepared to say the plaintiffs could recover." The objections stated by him to the applicability of the rule to our laws, it is respectfully suggested, apply to the effect of the destination, *not to the fact of destination* itself. With regard to the former, it must depend, necessarily, on the laws concerning the prerogative, and the police of the country. In relation to the latter, it is a question of contract of grant, concerning which, rights have been acquired, sales have been made, the value of property has been affected; which grant, or privilege, or destination, has never been, as respects the spot in controversy, attempted to be revoked until the issuing of the present patent.

In matters of contract, the laws of all civilized nations must generally be the same. The forms of contract may be different, but when an obligation is contracted, the law every where orders it to be performed. There are persons exempt from legal coercion, but it may be safely considered as law every where that faith must be kept. It will not have escaped the attention of the court, that the Cincinnati case is not decided on any principles peculiar to the common law, the statutes concerning destinations to charitable and religious uses, are considered as furnishing a rule of equity, which, in administering the laws, the court feel themselves bound to adopt. In the present case, the reason is the same, and why is not the law the same?

It can be shown by the Roman law, the same mode of dedicating, or destining, public places and things to religious purposes, was adopted. *Vide* 5 *Pandectes Francaises, pages* 13 to 28.

These systems of law coincide as to the primitive objects. In England and in the United States, equity, reason, and justice, render them applicable to destinations for public purposes. The court does not decide according to positive law, it is at liberty to carry into effect the justice, the equity, which, they must feel, will result from the adoption of the principle. Under the rules of our own law, "in civil matters, where there is no express law, the judge is bound to proceed and decide according to equity." To decide equitably, an appeal is made to natural law, and reason, and received usages, where positive law is silent.

Equitas in omnibus maxime in jure spectanda est.

The court appear to consider the Supreme Court of the United States, as deciding in the case cited, "that any ground left vacant by the proprietors in establishing a town, is subject to all the rules which govern an appropriation of land to streets and highways." A further examination of that case, and investigation of the principles on which it is decided, will, it is believed, bring the court to a different conclusion. The Supreme Court do not decide the case on the fact of the ground having *been left vacant*, but on the fact of its being destined to public uses. The fact of destination being established, its irrevocability is inferred from the contract on principles of equity and justice. The destination may be proved like any other fact. It may be inferred from the ground being used *as a street*, with the consent of the owner; but throughout the opinions of the court, the fact of destination being proved, as assumed, the court give their opinions as to its consequences. A street or road is not, in this sense, vacant, it is *appropriated* to the use of the public. *Vide, also, Barclay et al.* vs. *Howell's lessee*, 6. *Peters* 499.

This court, in the case of the *Mayor et al.* vs. *Mitzinger*, say, "general usage, however, is the only ground on which the appellants rest their pretensions. *No plan of the city has been exhibited* to show that the lot of the appellee, is located upon a place which had been reserved for public use; no testimony has been adduced to prove that this spot is part of the ground laid out for the public road." *Vide* 3. *Mar.* 304.

May it not be inferred, from this opinion, that a plan was considered evidence to show the destination to public use, and that the two courts have come to the same conclusion on this subject. Indeed, in the absence of positive law, it is difficult to conceive how any other can be supported. It is impossible, in limits which custom has assigned to an application of this description, to set forth all the illustrations and authorities which may exist in the books. The object of the undersigned is to present to the court the reasons on which he considers a rehearing ought to be granted, without having either the time, or ability, to present them in any other than the present imperfect form. The learning displayed in the opinion now under consideration, renders this task difficult, but he trusts that the court will afford an opportunity of a further investigation of the grounds upon which the court has excepted this case from the principles laid down in the cases of the cities of Pittsburgh and Cincinnati, and which had been previously recognised by the judicial tribunal in Louisiana, in the last resort, under the Spanish Government. This tribunal determined that Gravier was bound by his plan which he had made of the fauxbourg St. Mary, and that the designation of a public place by him, in the plan, could not be revoked by him, and that the square should be left free for the public use, and the works erected on it should be demolished. The tribunal recognized the principle, that the plan destining the square to the use of the public, was irrevocable by him. It is not considered that the circumstance of an appeal having been interposed to this decision, and not prosecuted, can afford any inference against its legality, and it certainly is a fair presumption, that those who were charged with the administration of justice, were not ignorant of the laws.

Under these authorities it is concluded, that by the plan and admissions, the space designated as a quay, was constituted such by the sovereign of the country.

The attention of the court is solicited to an admission in page 37 of the record. "It is admitted by the plaintiffs, that, previous to the cession of Lou-

siana from France to Spain, there were several sales of lots made under the French Government, said lots fronting the river, which were sold with the description of *face au quai:*" also to a grant from the governor general of Louisiana to Broutin, the engineer of the king, dated May 1st, 1733, in which the lot is described as being "*sur le quai,*" *page* 44. These facts show that the spot was considered as a quay by the French Government in Louisiana, after the date of the plan.

The presiding judge of the court has stated that "squares or other spaces of land appearing to be left vacant in the plan of a town or city are not (in his opinion) in consequence of this fact alone to be considered as public places, and irrevocably dedicated to the use of the whole world. The plan ought to contain something on its face to show their destination and appropriation to such use, in order to imply a promise on the part of the original owner of the soil and founder of the city, that they should always remain open for the use of the citizens and the public in general." It is respectfully submitted to the court that the evidence before mentioned, brings this case completely within the rule above laid down.

Having now stated the evidence going to show the destination and appropriation of the land in front of the city, as a quay, and the law in relation to such destination, it now remains to consider the relative rights thereto of the different governments which have existed in Louisiana and the public.

Notwithstanding the learning and research which has been put forth on this subject, it is apprehended that a correct decision of this case depends upon matters which have not been so fully presented to the consideration of the court, on the first argument of this case, as they might have been.

One fact must never be lost sight of in considering this case; there is no evidence that the French Government ever exercised any power over the quay adverse to the rights conferred by the plan; therefore, as the power was never exercised, all inquiry as to its extent is immaterial. It is sufficient for all the purposes of the defendants, that the power to regulate public places was a sovereign power.

Even at the hazard of being prolix, the undersigned cannot refrain from adding a few remarks on the subject upon which the judges dissent—the meaning of the word *quay*.

This word in the French language, whatever may be its origin, or whatever philologists may have written on the subject, is used in the cities of France situated on rivers, particularly in the capital, to designate the space or public way between the houses fronting the river and the river. In Paris, there is the quay of the *Louvre*, the quay *de la Tournelle*, in Lyons, the quay St. Clair. A person is said to live on this or that quay, who occupies a house fronting the river from which it is separated by a space called quay; and by which name it is alone known, the word *street* is not applied to it. The name of each quay is on each corner as the names of streets are. In the cities of St. Domingo it is used in the same sense.

Some of the quays are supported by works of *revetements*, others are sloped down to the water's edge in order to facilitate the unloading of boats. The quay de la Tournelle is of this latter description. The space in front of the city was denominated and destined as a quay. It was so considered and called by the officers of the French Government; lots were sold with the quay as a boundary. It is not only admitted "that words cannot unmake things. The judge, whose native language is French, corroborates these illustrations in his opinion; and disputes, to be sure in vain, this tri-

umph of philology over fact. For a fact it certainly is that the space between the front of the city of New Orleans and the river was constituted by the plans of 1724 and 1728 a *quai*. The space was large, but as has already been shown, it was to serve for a great mart, for a great capital, and if it had been twice as large, it would not more than serve the future wants of the commerce of this emporium of the west.

Mr. Jefferson uses the word quay in the same sense. His attainments as a scholar, his acquaintance with the French language, and his opportunities of knowing the sense in which the word was generally employed in France, from a long residence in that country, give weight to his authority. In commenting on the testimony relative to the batture and shores of the Mississippi in the upper part of the city, he remarks that "it has served as a quai for lading and unlading goods, stowing away lumber and firewood." And "that the public had ever been considered as having a right to the breach as their port and quai;" "the citizens in the daily habit of using without control the port and quai, imagined themselves exclusive proprietors of its soil."

Quai is thus defined in the dictionary of Fain, ed. of 1817: "La levée faite le long d'une riviére entre la riviére même et les maisons," "Le usage d'un port de mer qui sert pour le chargement et le déchargement des marchandises."

"On appelle aussi quai, un espace reservè sur le rivage d'un port pour la charge et la décharge des marchandises." Le dictionaire des arts et des sciences. Paris 1731.

The learned author of the Pandectes Francaises, a work often cited with approbation by this court, in his *explication des termes et les régles de droit*, says: On appelle aussi *ports* sur les riviéres ou fleuves, les endroits où les bateaux abordent pour être chargés et déchargés. Les routes construites. terrassée, et éleveés le long de leurs rives, s'apellent *quais.*" Vol. 16, p. 118.

Grands chemins, are defined be *routes publiques*, qui conduisent aux différentes provinces, aux différentes villes. 5 *Pandectes Francaises, p.* 39, *Route*, is defined to be grand chemin, chemin public. *Dictionary of Fain, verbo route.*

It probably answers to our terms highways, or roads. This court in the case of the *Mayor et al.* vs. *Metzinger*, uses the following language on this subject:

"But the appellants contend that the spot on which it (the lot claimed) is located in part of the public highway, and therefore could not have been lawfully granted for private use even by the king himself."

"That public places, such as roads and streets, cannot be appropriated to private use, is one of those principles of public law which required not the support of much argument. Nor is there any doubt that if, by a stretch of arbitrary power, the preceding government had given away such places to individuals, such grants might be declared void. 3. *Mart.* 393.

Again, "we conclude that the part of the Roman law which declares the soil of a highway to be public property, appears to us to be in force in France, and was so in Louisiana, when the country passed under the dominion of Spain." *Vide Renthorp et al.* vs. *Bourg et al.*, 4*th Mart.* 138.

Quays are generally works of art, that is, the primitive condition of the banks of rivers require to be adapted to the purposes of landing and loading merchandize. Alterations were of course necessary, works were to be

erected, inequalities of soil levelled, levees to be constructed on some rivers. But the more or less degree of labor required to be expended on the works, or of alteration to be made on the banks, cannot effect the destination of the place or the real character of it in point of fact. If it is made by nature or art to answer the purposes of unloading and loading merchandize from vessels, and has been appropriated as such by public authority, it is a quay. Roads are, by the improvements of modern times, required to be constructed, and much labor expended on them, but a road is not less a road by being made in all respects convenient to the public by the soil being so level as to require nothing to perfect it, and a place destined, named, and used as a quay, is not less one because it required little elevation to make it convenient for public uses.

The court appear to admit, that if this space was necessary to the enjoyment of property sold or conceded, the sovereign power could not alienate it. This is a matter of fact which the court has determined adversely to the defendants without evidence, as has already been stated. But suppose it appear that this space is *indispensable* to the use and *enjoyment of the public rights* of the inhabitants of Louisiana, are not public rights as sacred as private? Are they not equally protected by the laws? Is not the right of each individual to pass the streets, to wall in the public place, to have free access to the port for the purposes to which a port is destined, as perfect a right as that which he has to his own house? The court undertake to distinguish between streets and the quay, that the former are "*indispensable to the enjoyment of urban property;* without them, a town could scarcely be said to exist."

And it may be asked, according to the same reasoning, is not a quay a place for securing vessels, and unloading goods, indispensable to the use of a port? Without it a port could not exist at all.

Is it right, without any evidence on the subject, to decide that a public quay destined for the capital and port, the future extent and commerce of which it would be presumption, at this day, to calculate, is too large for that purpose, when, even now, the present state of things have rendered it necessary for the convenience of the port.

The court cannot fail to perceive, it is believed, that they have fallen into an error in deciding this question in the negative, particularly as it is now used for the purposes of the port, and its being necessary for such purposes is not *negatived in the petition*, and is not attempted to be disproved by any testimony.

This, then, is public place, it is a part of the port, necessary for the purposes of a port, and its occupation by buildings is incompatible with the uses of the port in its present condition. Let it be understood that the spot in question, is situated between the front street and the river, and it is asserted that the appropriation of the space similarly situated along the river in front of the city, that is, between the front street and the river, to private purposes would shut out all access to the shipping, and do more injury to public rights and to private property than the shutting up any three streets in the city. And that it is not so appropriated depends *entirely on the will of the* government of the United States, if the decision in this case be the law of the land. Such is the tenure by which public rights are held in Louisiana. In relation to the vacant lots on the other side of the street, the question does not rest on this ground, for it cannot be contended that they are necessary for the purposes of the port in its present state, since they

are not so used, and all the conveniences of securing vessels and unloading cargoes are effected without them. The definition quoted by the presiding judge, of the meaning of the English word *quay*, is not considered as authority, inasmuch as the question is, as to the meaning of the French word *quai*. Never was there a stronger example of the truth of the maxim of our law than in the present inquiry: *Omnis definitio in jure civili periculosa est.*

Ports are public like highways, streets, and other public things. "Rivers, ports, and public roads, belong to all men in common." *Partida*, 3 tit. 28, law 1, 6; Institutes, lib. 2, tit. 1, sect. 1. *Flumina pene omnia & portus publica sunt, dig. lib.* 1, *tit.* 8, *art.* 9.

A port is defined, "*conclusus locus quo importantur merces inde exportantur. Eaque nihilominus statio conclusa atque munita est. L.* 59, *d. de verbor significat.*"

Mr. Livingston and Mr. Jefferson's views coincide on this subject. The former, in reply to Mr. Jefferson's, says: "The bed of the river, he, (Mr. J.) says, *belongs purely and simply*, to the sovereign as the trustee for the nation, but then he acknowledges, '*that it cannot be his personal property*,' nor an object of revenue, but must be kept open for the free use of all the individuals of the nation." The latter part of this position is correct. 5 *Hall's law Jour.* 213.

Again Mr. L. says, "the truth is, the bed of the river is private property, when the river abandons it, but the public have a right to a free use of it while the river continues its course. The sovereign has no property in it, he is only bound as conservator of the rights of his subjects, to see that no one usurps more of this common use than he is entitled to; or disturbs any other in the use of it, or renders it less fit for public purposes. He exercises the same right over a river that he does over a highway." The same thing may be said of the *banks* of navigable rivers, of which the use for certain purposes is in the public, and the proprietor cannot legally make any improvements on them which interfere with this use.

"I admit, then, and have always admitted, that as riparian proprietor, I could not legally project any work into the river that should injure its navigation, or erect any on its banks that should interfere with the use of the public." *Ibid.* 213, *vide Toullier, vol.* 3, *No.* 37.

Things which belong in common to the inhabitants of cities and other places, are of two kinds.

Common property, to the use of which all the inhabitants of a city or other place, and even strangers are entitled in common, such as streets, the public walks, the *quays*. *L. C. art.* 449.

This being a public place by its destination, by its positon, by its being necessary for the enjoyment of other public rights, and by its being used as such up to the year 1788, for up to that period, *ab urbe condita*, there is no evidence showing that its destination by the plan, was iminged by any adverse occupation, and since that period, (as will be afterwards shown,) there has never been occupation inconsistent with the rights of the public to it as a public place. Can it now be legally applied to private purposes? and if it can, by what power?

It is believed that a sufficient answer to this is afforded in the opinions now under consideration, and in the numerous authorities therein cited; that it is the sovereign power, the power in which the rights of making laws is vested. It will be shown hereafter, that none of the preceding govern-

ments in Louisiana ever exercised any authority as to the spot in controversy, adverse to the rights of the public to it as a public place.

Domat, in the passage cited, considers the power of selecting and marking out the places which are to serve the public for these different purposes, viz. streets, highways, public places, &c., to belong to those in whom the power of making laws and regulations in such matters is vested.

It is inferred by the court, that the power of disposing of the *Campus Martius* was vested in the Roman Senate.

Toullier considers this as a sovereign power vested in those who have the right to make laws.

Grotius and Puffendorf, *loc. cit.* divide public property into two kinds, one they denominate *national domain*, and the other the *domain* of the crown. The revenues of the latter, the king, when he is absolute, might dispose of at his will; of the former *he had only the administration.*

By law 3, tit. 32 of the 3d Partida and dig , law 16, tit. 8, lib. 43, the sovereign might grant permission to build on public places.

The commentary of Rodriguez on this law, is worthy of note: "In the case mentioned in this sentence, it must be understood that the building must be so constructed that no one should be injured in his right (*per judique*) thereby because the *privileges granted by princes* are understood to be granted without prejudice to third persons." *Rodriguez*, 15 & 16, *p.* 337.

By these laws the power under discussion is a sovereign power.

Under the consular Government of France, which followed the Government of Spain in Louisiana, the power certainly underwent no change adversely to public rights. Was the power in relation to the place in controversy under the Government of the United States, a power held *á titre de souveraineté, or á titre de propriété?* Was it a sovereign power inseparable therefrom, inalienable and not susceptible of being held or exercised by an individual, or was it a mere right of property which might be sold as the right of property to public lands?

It is more than once stated by the court, that those charged with the administration of the different governments in Louisiana, are presumed to have understood the laws which were in force at the time of their administration, although the same credit does not appear to have been extended to the decisions of the judicial tribunal in the last resort. It is, therefore, a very fair presumption, that those at the head of the government of the United States at the time of the cession of Louisiana from Spain to France, and from that power to the United States, and who represented the executive power of the Louisiana for years subsequent to that event, were not ignorant of those sovereign rights which they were administering.

At the head of the government of this country at that time was Thomas Jefferson, the man by whose wisdom and foresight Louisiana became a part of the United States. His acquirements, his learning and profound knowledge of public law, matured by years of experience in diplomacy and government, his particular and accurate knowledge of the subject of sovereignty, give to his opinions an authenticity which, in this age, and particularly in this country, it would be vain to contest. There is no man whose opinions on this subject are entitled to so much respect from his experience and from his various and profound acquaintance with the works of various writers on public law. It must be forgotten that at this time the President was aided in his councils by the enlightened Madison, whose knowledge on this subject was not perhaps inferior to his own.

Mr. Jefferson may not have understood the French and Spanish laws relating to land titles in Louisiana; his various avocations probably directed his attention to more important matters; but he understood thoroughly the public law of the United States. He may have erred in his construction of an act of Congress, but his views on the subject, which are about to be presented to the court, received the approval of his great antagonist, Edward Livingston, whose knowledge, derived both from learning and experience on this subject, is equally incontestible with that of his illustrious opponent.

Mr. Jefferson, in speaking of the batture in front of the faubourg St. Mary, says, "the citizens in the daily habit of using without control the port and quai, imagined themselves exclusively proprietors of its soil, and came forward in that capacity, claiming sometimes under some vague title which they did not define, and sometimes under the abandonment of rights by B. Gravier; the sovereign formerly their kings, but now the United States, the legal holder of the public rights in the beds, beaches, and banks of all navigable waters, seem not to have been thought of in the contest." 5 *Hall, law jour.* 13.

Again: "The same laws make it peculiarly incumbent on the government and its officers to watch over the public property and rights, and to see that they are not injured or intruded on by private individuals. In order to preserve the navigation of rivers, it is proper for the government to prohibit and punish all attempts which might hinder it, or render it inconvenient, whether it be by any buildings, fisheries, stakes, floodgates, and other hindrances, or by diverting the water from the course of the rivers or otherwise. And it is likewise forbidden to throw into the rivers any filth or other things which might be of prejudice to the navigation or cause other inconveniences." *Dom. Pub. law*, 1, 8, 2, 8, *ibid* 67.

And surely it is the territorial legislature which not only has the power, but is under the urgent duty of providing regulations for the government of this river, and its inhabitants; regulations adapted to their political relations as well as to the peculiar character and circumstances of the river and the adjacent country." *Ibid* 69.

"That it (the batture) serves as other beaches do, for a port while covered, and a *quai* uncovered, and is the only port in the vicinity of the city which river craft can use."

"That it is not lawful for an individual to erect on either the bed or bank of a river any works which may affect the convenience of navigation of the harbor or quai, or endanger adjacent proprietors on either side of the river." *Ibid* 80.

The legal title to the batture, Mr. Jefferson considered as in the United States as the sovereign power, but the use to be in the public.

"As to navigable streams and rivers, says he, on which boats can ply, the property of them is in the king, as an incontestible right, naturally attached to the sovereignty; and since public things belonged to the people in the Roman republic, amongst us (in France) they must belong to our sovereign."

"So, I presume no question is to be made but that the bed of the Mississippi belongs to the sovereign, that is, to the nation." *Ibid* 59.

In his communication to Congress relative to the batture, Mr. Jefferson says, "it has been used by the city immemorially, to furnish earth for raising the streets and court yards, for mortar and other necessary purposes, and as a landing or *quai* for unlading fire-wood, lumber, and other articles brought

by water. This having lately been claimed by a private individual, the city opposed the claim on a supposed legal title in itself; but it has been adjudged that the legal title was not in the city. It is, however, alleged that the title, originally in the former sovereigns, was never parted with by them, but was retained by them for the uses of the city and province, and consequently has now passed over to the United States." *Ibid* 87.

He considered Congress the *legislative* power, the only competent power to regulate the rights of the public. The title was considered to be in the United States as the sovereign, and the use in the public. The legislative power for Louisiana, in the last resort, was in the Congress of the United States; that was the only power competent to direct or alter the uses of places in Louisiana, of which the public had the enjoyment. The local legislature was subordinate under the territorial government, and had not the sovereign power of making laws. Acts passed by them were subject to the approval of Congress.

Mr. Livingston, although contesting in every possible form most of the positions of Mr. Jefferson, admits the position of the latter, that the use of the batture was then in the public, and that he must exercise the rights of property which he claims, subject to that use. *Vide* 5, *law jour.* 213, *already cited.* The exercise of power in relation to this use, appertains to the sovereign, but he contended that the local government of Louisiana was vested with that power by the ordinance of 1787, which was the constitution of the territory of Orleans. His opinions on this subject are as follows: "The bed of the river and its shores belong (says Mr. Jefferson's argument) to the public. The sovereign is the guardian of this public right, and though the soil of the bank may belong to an individual, it is the duty of the sovereign to take care that this right of private property yield to the public use."

"The territorial government, for all the purposes of domestic rule, is as distinct from, and independent of, the General Government as is that of the States. By the ordinance of 1787, which, at the period of the transaction, formed the constitution of the territory of Orleans, there was a Governor, with executive power, a Legislative Council and House of Representatives, with authority to make laws in all cases for the good government of the district, not repugnant to the ordinance or constitution, and a judiciary regularly organized. In short, a local government, complete in all its parts, excluding as much any interference of the Federal Government, as those established in the States. The care, then, of all these public rights in the territory of Orleans belonged exclusively to the proper branch of the local government." That the right of interference resided in the territorial, not in the general government, is, in effect, acknowledged by Mr. Jefferson himself, who tells us that "surely it is the territorial legislature, which not only has the power, but is under the urgent duty of providing regulations for the government of this river and its inhabitants, &c." In the same page, he tells us that "the governor and cabildo (municipal council) seem to have held this pretorian power in Louisiana, as well as that of demolishing what was unlawfully erected, and that the act of the legislature without taking the power from the governor and city council, gives a concurrent power to the parish judge and jury," &c. *Ibid*, 220, 221.

Thus it is perceived that these learned and accomplished publicists, though disagreeing on almost every other question which passed under their consideration, and both exasperated by a bitter controversy emited in recogni

zing the truths of these positions: that although the fee or title in beds or banks of rivers might be in the sovereign, as trustee of the nation, the right of the use was in the public: that the sovereign is the guardian of the public right, and that it is the duty of the sovereign to preserve this public right: that an exercise of power to that effect, to be legal, must emanate from the sovereign power.

They differ as to the political body in which this right of sovereignty is vested: the one contending that it is vested in the Legislative power of the United States. Louisiana, then, not being a state, and not having any legislature in the last resort, the other, that it was vested in the territorial government.

This power in the case of the batture, related to what the president considered a quai, and it was conceded to be a place or thing of which the public had the use, until its destination should be changed by legal authority.

M. Jefferson considers, throughout his exposition, the sovereign power in relation to quays in Louisiana, of which he maintained the public had the use. The sense in which he used the term *is not contested* by Mr. Livingston; a strong proof that it was used in its proper sense. *Ibid.* 6, 12, 13, 80, 81.

Thus, therefore, are submitted to the court the opinions of Mr. Jefferson in relation to the public rights and the sovereign powers respecting quays in Louisiana. It is inferred, from what precedes, that this being a sovereign power, it could not be exercised *in relation to the use of this property* by the Government of the United States. The sovereign powers over the soil in Louisiana vested in the people of Louisiana by the adoption of the Constitution, and their admission into the Union on a footing with the original States. This power is not one of those vested in the Government of the United States, nor is it necessary or pertinent to the exercise of any powers vested by the Constitution, and consequently the Government of the United States cannot hold or exercise such a power; but, by the erection of Louisiana into a State under the Constitution of the United States, all such powers are necessarily vested in the State. The only property which the United States can hold within a State must be authorized by the Constitution or by law; it must be held by the title of property or by the title of sovereignty. But it can only be held for those objects of which the Constitution confers the authority for her fiscal, military, naval and national purposes. The sovereign right of regulating the destination and uses of public places within a State, in relation to which public rights exist, the Government of the United States no more possesses than the Government of China.

But, on the admission of Louisiana into the Union on a footing with the original States, a transfer of sovereign powers was necessarily effected. It is not necessary, in the examination of this subject, to impinge on any vexed question of State rights, and as the consequences resulting from the admission of Louisiana into the Union under the treaty, it is contended, necessarily result from the organization of our political institutions; they are obvious to all understandings, and are best presented in the simplest form possible.

By the act of Congress of April 8, 1812, Louisiana was "declared to be one of the United States of America, and admitted into the Union on an equal footing with the original States in all respects whatever."

Louisiana, then, was invested with all the sovereign powers which the original States possessed; they were transferred to her. The United States retained their sovereign powers, but they were not more extensive, (being identical,) in relation to Louisiana than to any one of the original States.

The United States could hold as property any lands in Louisiana which belonged to them as such.

The United States could hold as property, or as dependent on the sovereign powers, those things which, under the Constitution of the United States, were vested in the United States, or necessary to carry into effect the powers so vested.

But the title, the ultimate right to those things which of necessity appertained to or depended on the sovereign powers with which the State was invested by being constituted a State, were of necessity transferred to Louisiana by her admission into the Union. Because, if any of the rights of sovereignty, whether of property, of use, or of administration were abridged, the guarantee of the act of admission would be violated, to wit, that she should be admitted into the Union on an equal footing with the original States in all respects whatever. Her rights of sovereignty are equal within their sphere to those of the United States, but they are separate and distinctly marked out by the Constitution of the United States.

In America, the title of the soil and all rights appertaining thereto, were considered as vested in the king. The title to the beds of rivers, ports, and those things of which the public had the use, were considered to be in the sovereign by modern publicists, as the trustee of the nation. Our code says:

"Public things are those the property of which is vested in a whole nation, and the use of which is allowed to all the members of the nation: of this kind are navigable rivers, sea-ports, roads, harbors, highways, and the bed of rivers, as long as the same is covered with water." *La. Code, art.* 444.

In accordance with this doctrine are the opinions of Mr. Jefferson and Mr. Livingston, vide 5 law Jour., p. 58, 59 and 213, which have been already quoted.

The title to the property in dispute was originally vested in the monarch of France, as the court contend. It passed successively to the monarchs of Spain, to the consular Government of France, to the United States, who, while they held Louisiana by sovereign authority, of course had the title of the previous monarchs, but the moment their sovereign authority was divided, and, in part, vested in the State of Louisiana, the rights attached to the vested sovereignty were vested with it; and the Government of the United States has no more control over this spot, than they have over the streets, public places, banks of rivers, or shores of the sea.

The right to the use of these is a vested right, as valid in all respects as any right to private property. To use the language of the court, in the case of *Allard et al.* vs. *Loban*, 2. *M. N. S.* 319, after a brief commentary on art. 6, page 94, of the old civil code relative to public things, *judge Porter*, in delivering the opinion of the court, says:

"The use thus granted to each individual of the things just mentioned by the public, who are the owners, appears to us to confer the right of enjoyment in as full and complete a degree as that which would be derived from the concessions of a private proprietor on soil that belonged to him."

The power of the crown, under the former governments, over this space,

under the previous laws which have existed in Louisiana, is a matter of prerogative depending on the constitution of the monarchy; the title in the hands of a different government is not affected by it.

The constant practice of the Government of the United States since its foundation, and of the State of Louisiana, has been in accordance with these principles. No act can be found in the history of the country in which the United States have attempted to grant to individuals lands within the jurisdiction of a State held under any other title than that of property, or under the sovereign powers of the General Government. The shores of the sea, the banks and beds of rivers, flats left dry by the recess of the sea, the control of streets, public places, and all things of which the public has the use, have been subject to State legislation alone. The statute book of the maritime States abound with laws on these subjects. In Louisiana, if any part of the shores of our lakes, which are arms of the sea, are to be occupied, who grants the authority to change their destination? Our own legislation is conclusive on this point. The charters granted to the Pontchartrain rail-road company, and to the canal and banking company, are in exercise of the sovereign right over the shores of the lake. What title has the State to the shores of the lake? What authority to regulate the use of them? Where is her charter? Her charter is her sovereignty; her admission into the Union on the footing of the original States in all respects whatsoever.

Those who have administered the government of the United States in all their relations with the States, have never claimed any sovereignty or jurisdiction over the soil of any State. Louisiana, in 1818, ceded to the Government of the United States her jurisdiction over Frank's Island, at the mouth of the Mississippi, for the purpose of erecting a light house. *Vide* 2. *Moreau's dig.* 670.

Judge Story, in speaking of the jurisdiction of the United States over particular places within the several States, uses the following language: "although the United States may well purchase and hold lands for public purposes within the territorial limits of a State, this does not, of itself, oust the jurisdiction or sovereignty of such State over the lands so purchased. It remains until the State has relinquished its authority over the land, either express, or by necessary implication." 2. *Mason's Rep.* 63.

No further illustration can be deemed necessary of principles so self evident.

On the question of prescription, the court consider that two years of possession are wanting to complete the title under it. The court say: "The title by prescription is not sustained. The law of Spain required forty years possession in a community. From 1769, when that country acquired Louisiana, to 1831, is 62 years, 24 of these the *locus in quo* was occupied by the plaintiffs or those under whom they claim. This leaves but 38 years for the possession of the city." P. 34.

The court leave out of view, entirely, the time from 1728, the date of the last plan, to the year 1769, during which period, under the plan the public must be considered to have been in possession, because no adverse possession is proved, and because no act was done by the sovereign of France, or his representative, to change the destination of the place as fixed by the plan, and no grant, concession or permission emanated from the French government by which it was attempted to be appropriated to private purposes. The plan not having been changed, the possession of the public

in relation to streets and public places unapplied to private use must be considered at this distance of time without any evidence to the contrary as being in accordance with the plan.

But how is it possible that the occupation of a lot, under the permission to build a cabin and to rebuild of the same dimensions, can be considered as a legal possession, so as to give the party rights in relation to it adverse to the public use. It is stated by the court, "the king might own public places in a city because there is a prohibition to build on those which belong to him without his consent." *P.* 24. The law referred to is in *Partida* 3. 32. 3. and is as follows: "Every person may forbid the erection of a house or other edifice in public places or threshing grounds (exidos) of a town." "If a man begin to erect a new edifice in the public places, or street, or common threshing grounds of any place without the permission of the king or of the council, upon whose ground he builds it; then any one of the inhabitants may forbid him to continue the work, unless the person forbidding be an orphan, &c., for they cannot do it except where some new work is constructing upon their property."

If public places belonged to the king, as property susceptible of being applied to private purposes, where was the necessity of prohibiting persons from building on them *without his permission?* This necessarily resulted from the right of property being in the crown. This law, which is in accordance with that already cited from the Roman law on this subject, related to the sovereign right which the crown possessed as to public places and the right to regulate their use. Let it be conceded that the Roman emperors and the kings of Spain had the right to grant permission to build on public places, according to the laws cited, and that the permission in this case by governor Miro in the first instance, and by the Baron Carondelet afterwards, was in the exercise of that right, it follows, as a necessary consequence, that their exercise of power was in accordance with the title of the public, and consequently cannot be considered as adverse to it.

The possession, in consequence of such a permission given by the king or the council, cannot be considered as adverse to either, because it is in conformity with what may be considered a condition of the tenure. Take the case as an individual who should lay out and establish a town and sell the lots, reserving to himself the right of granting permission to build on a public place destined by the plan for the use of the public, provided it did not interfere with the public convenience; that he should, under similar circumstances, grant similar permission, would it be pretended that the tenant had, in any sense, the legal rights given by our laws to possessors, or that his occupation *under the permission* gave him any rights adverse to the grantor or the purchasers?

In relation to public places, the powers of the monarchs of France, it is conceived, are not necessarily connected with the rights set up by the defendants; because these powers were never exercised in relation to the place in controversy. If quays under the laws of France could be the subject of private property, this was never by the government of France attempted to be so applied; its destination, as fixed by the plans, never was changed by that government.

As to the powers of the Spanish government it may be conceded, for the sake of argument, that the king had authority to grant permission to build on public places. But do not these very laws prove conclusively that he had no power to *alienate the soil?* If he had this power, why is

the authority given to grant permission to build? Does not the right of selling the soil necessarily include the authority to grant permission to build? Does not one right include the other, as certainly as the greater contains the less? These laws repudiate the right in the sovereign of alienating the soil of public places. Laws like these, must exist in every country. They are necessary laws of administration. We find the law nearly to the same effect in France. "If it should happen that some buildings were made on a public square, it might either be demolished if it should prove any way hurtful or inconvenient, or be suffered to stand upon condition of its paying a rent, or making some other amends to the public, if found to be more advantageous to let it remain, either because it would be an ornament to a market place, or other public place, or because of the rent it would yield, or other advantage that might be made of it." *Domat, public law B.* 1. tit. 8, sec. 2, art. 19. But the right of alienating the soil of public places at will, is very different from that conferred by these laws. The permission to build is revocable at will, it may be qualified, as was done in the present case, so as to be for good, and to the detriment of no one, and may be always granted in such a manner to be exercised consistently with public convenience. But when the soil is alienated to private individuals, they enjoy it as their own, and apply it to all the purposes of private property, consistent with the laws. The attention of the court is particularly solicited to *these facts.*

1. That the subject of this inquiry is the right of alienation of the soil to individuals.

2. That by no law of Spain, or by the Roman law, has it been shown (and if any such authority existed, the acknowleged learning of the council for the plaintiffs would have enabled him to furnish it to the Court) that the sovereign had the right of *alienating public places* to private individuals. They may have had the right of regulating the use, but they had no right to alienate the soil to private individuals.

The Novissima Recopilacion, book 7, tit. 16, law 1, appears to be conclusive on this subject. It is quoted by the court and is as follows: "Our pleasure and will is to preserve their rights, rents, and property (proprios) to our cities, towns, and places, and not to make any gift of any thing of them; wherefore we command that the gift or gifts which we may make or might make, or any part of them, to any person whatsoever, are not valid (no valgan.")

3. That as to the spot in controversy, the power of the Spanish government on this subject is immaterial, because its officers never attempted to exercise it; they never attempted to alienate the soil; they gave permission for a certain purpose to build, which was entirely inconsistent with the idea of the transfer of the soil.

The court has stated instances of the absolute alienation of parts of the space designated as a quay by the officers of the Spanish Government to individuals. But it will not have escaped the notice of the court, that this case rests ncessarily on a different principle. In those cases the question was as to the validity of a grant from the sovereign power. In the present case the grant is from a power which is not the sovereign. The acts of the cabildo, as stated in the opinions of the court, go to show that these grants were not acquiesced in by that body, and the question of the public right remained undecided at the time of the change of government. The acts of the intendant, in 1799, as to any land titles in Louisiana, ought to be confined to themselves. Nothing ought to be inferred from them in derogation

of the public right. The acts of the officers afterwards in relation to the public domain, show that they would be unsafe guides in matters of public law.

There is a point, which in its important bearing on the merits, yields to none which have been examined by the court, which appears to have been passed over without receiving that attention which it deserves.

It is stated in the opinion of the court, "that if the kings of France or Spain could have made the premises now in dispute the subject of donation to individuals, the *United States have* the same power."

In this hypothesis the important fact is lost sight of, that Louisiana was acquired, not from the kings of France or Spain, but from the consular government of France. The ancient laws of France concerning the *prerogatives* of the kings had been annihilated by the French revolution. The laws of Spain, concerning the powers of the monarch, were of necessity suspended by the laws of France, as it respects the sovereign authority. Louisiana was acquired with her public rights and those of her citizens, not as they existed under the despotic monarchs of France and Spain, but as they were guarantied under the laws of the French republic, which became the sovereign power.

The United States acquired Louisiana from the French republic. The powers of government were not as before. Concentrated in the person of the sovereign, but were subdivided into different departments, represented by different magistrates. The rights of the public and the prerogatives of each branch of the government were of course limited by the constitution and laws; and the important inquiry is, not the extent of the power of the kings of France or Spain, but that of the consular government over places of this description. On this subject we have the authority of Toullier, as cited by the court. 3 *Toullier, tit.* 1, *chap.* 3, *No.* 30, 36, 39.

In No. 40, cited by the court, Toullier states, "That things out of commerce cannot be sold as long as their destination is preserved. The things described to be out of commerce are those things that are not susceptible of private ownership, and those which, although they may be susceptible of it, are naturally consecrated to public uses incompatible with private property, but which return to commerce (rentrent dans le commerce) the moment that their destination is changed. Such as roads, highways, streets, gates, walks, ditches, and ramparts of fortifications."

But Toullier expressly says, "That things *(biens)* belonging to the *State* can only be sold by authority from the legislative power, a branch of the *sovereign* power." It will be remarked here, that Toullier includes among public things those which are susceptible of private ownership, but which are naturally *consecrated* to public uses. The Roman law is cited to the same effect. *Vide* 16. *Pandectes Francaises*, p. 200. "Public places are for the use of individuals, which they hold not in right of property, but as members of society."

Merlin has treated this subject fully. He considers the grand domain as including every thing not comprised within the petit domain; and the petit domain as composed of the property which has always been considered as alienable,—"á titre de propriété incommutable parceque l'exploitation en est dispendieux et le revenu modique."

By the ordinance of 1708, it has been contended quays formed a part of the petit domain, and were therefore alienable at the time Louisiana was under the monarchy of France. But the law of 1790 restored the law on

this subject to its former state under the ordinance of 1556, and declared to be *simples engagemens* all the sales and alienations of the national domains subsequent to the ordinance of 1556, excepting those things which belonged to the petit domain; but it does not extend the exception to every thing defined by the ordinance of 1708, as petit domain: on the contrary, it limits the exception to terres *vaines et vagues, landes bruyeres*, &c., without mentioning quays.

The law of the 14th Ventose, of the year seven, revokes generally all alienations of the domain subsequent to the ordinance of 1566. It contains some exceptions as to vacant lands, &c., but none as to quays. So that in France, under her modern legislation, quays were not considered as belonging to the petit domain; and under the definition of Merlin, appertained to the grand domain.

The law of 1790 provides for the inalienability of the national domain.

Art. 8. "The national domain and the rights dependent on it are inalienable without the consent and concurrence of the nation." They may be alienated by the legislative power by means of a formal decree, sanctioned by the king, on the formalities of law being complied with. If, therefore, quays were a part of the petit domain, under the ordinance of 1708, they were not so under the consular government. Admitting them to appertain to the domain, they were a dependence of the grand domain, and consequently inalienable, except by the *sovereign power. Vide Merlin Rep. Verb. Domain Public*, § 3.

The powers of the consular government of France over public places, roads, streets, &c., appear not to have been unlike those of our own. With us the sovereign power is divided,—the United States reserving its sovereignty over those objects to which by the constitution it extends, and the State exercising its sovereignty over the soil and its uses.

It is not necessary, under the decisions of this court, and under the law as heretofore explained, that the defendants should show a title to the soil, or a right to the use as a corporation. They show a right of use in the public, and they, as a part of the public, are competent parties to represent and vindicate that right against any claim or title set up adversely thereto, as was determined by this court in the case of Gravier.

For rights of this kind, there can be no formal grant, or letters patent. For they result from destination, and from being necessary to the enjoyment of private and other public rights. Where are the letters patent for the port--the streets? Property and privileges are held under letters patent, but rights like those under discussion are rarely evidenced by a more authentic title than an official plan and destination. Toullier, in speaking of public places, uses the word *consacrès*, which implies nothing more than a public destination.

The time allowed for the examination of the opinions so elaborate as those under consideration, does not afford an opportunity to counsel to submit his views on the various points which have been brought up and decided on in this case. The observations which are submitted relate to those which are, it is believed, of the greatest importance. The conclusions are as follows:

1. That the validity of the patent could be inquired into, under the decisions of the Supreme Court of the United States.

2. That it is an error of fact to assume that there was any permission from the Spanish Government to *settle on and occupy the lot in controversy.*

3. That it an error of fact to assume that the commissioners acted in a legal sense on the claim of those whom the plaintiffs represent.

4. That it is an error of fact to assume that the spot in question was what is called in the land laws, *vacant land, or lands.*

5. That the sense in which the word *quay* is used by the court, is contrary to its known application in the country to whose language it belongs.

6. That as to the fact of the destination of places for public purposes, the rule must be the same every where, unless there be a positive law to the *country:* it being a matter of contract &c., what is just in one place is just in another.

7. That the principles laid down in the cases relating to the cities of Cincinnati and Pittsburgh, have been recognised in Louisiana, under the Spanish dominion, by the highest judicial tribunal in the colony, and virtually, in the case of the present defendants against Metzinger, in which this court says, "*no plan of the city has been exhibited* to show that the lot of the appellee is located *upon a place which had been reserved for public use;*" because if a plan of the city could have *shown the place to have been reserved for public use,* it must have had the same legal effect which it is contended the plan of the city in evidence ought to have.

8. That by the plan and establishment of the city, *a quay* was established in front of the city, as described in the plans.

9. That a quay, in French is a public place, of which the public have the use, and which, of right, must be free and open to all, as roads, streets, harbors, ports, &c.

10. That the use of the spot in controversy is necessary to the enjoyment of the other public rights, the free and convenient use of that part of the port.

11. That if the front of the city, as laid down in the plans, was constituted a quay, or public place, the right of the sovereign over it was a matter of prerogative, which varied according to the different institutions of the government to which Louisiana has been subjected.

12. That the right of soil might be in the sovereign, and the use, in the public; that this was the case in all public places in Louisiana, as in England, under the common law.

13. That this right of use is a vested right, as much so as any right of property; it is subject to the regulation of the sovereign power alone, viz. the power in which the right of making laws is vested.

14. That this sovereign right of regulating the use of public things, is inseparable from sovereignty.

15. The United States held this power during the time they held the sovereignty of Louisiana.

16. That on the admission of Louisiana into the Union, by the act of April, 1812, this branch of sovereignty was vested in the State of Louisiana, and ceased to be in the United States.

17. That subsequently to that period, the United States have no more right to regulate the use of public places in Louisiana, than in Virginia, or New York.

18. That although the United States had the right of soil in the streets, beds of rivers, and public places in Louisiana, it was held in right of sovereignty, and not as property, subject to alienation.

19. That after the admission of Louisiana into the Union, the United

States, by the operation of the Constitution, was divested of this ultimate sovereign right, which fell to the State of Louisiana.

20. That the State of Louisiana has, alone, the right of regulating the *use of public things* in Louisiana, and as the sovereign has the right of disposing of the soil of all shores of the sea, roads, ports, and public places, not being private property when their destination becomes changed, so that they can be no longer continued in the public use.

21. That the law of prescription is with the defendants.

22. That no act was done by the French royal Government in derogation of the original plan of the city. No attempt was made to change the destination of the place as a quay, or to appropriate it to private purposes.

23. That the Spanish Government never alienated the spot in controversy; that the permissions to build were temporary and precarious, and conferred no rights to the tenant adverse to the public right.

24. That by the laws of Spain, the crown could not alienate public places, although the crown could regulate the use, and grant permission to build on them.

25. That by the laws of France, under the consular government, if quais appertained to the domain, they formed a part of the *grand domain*, the right to which is inseparable from the sovereign power, and was held in sovereignty, and not as property.

26. That in this hypothesis, that is, of quays appertaining to the grand domain, the United States acquired and held the spot in question in sovereignty, and not in property.

27. That this distinction between the right of property and the right of sovereignty, is recognized by publicists, and necessarily exists in all governments. *Dom. Pub. law, B. I. tit.* 6. §1. *art.* 1 & 2.

28. No alienation of this spot having been made by any of the preceding governments in Louisiana; none having been made by the United States while they held the sovereignty in Louisiana, the rights of the public can only be affected by the legislation of the sovereign power, which, on this subject, is vested in the State.

29. That the title of the plaintiffs, emanating from a power which had no authority to grant it, having no jurisdiction or authority over the soil, or its uses, is null and void; and the defendants must be left undisturbed in the enjoyment of their public right.

The following rule laid down by *Domat, in his treatise on public law, b.* 1. *tit.* 6. § 2. *art.* 26, closes this application: "It may be remarked, as a last rule of the rights of the desnesne, that although the said rights be very favorable in their nature, and by reason of their being set apart for the public good; although they be inalienable; although they be imprescriptible, and that it is of importance to the state that the said rights should be preserved; yet this favor does not reach so far as to extend these rights beyond their just bounds. And it is, on the contrary, for the good of the public, and agreeable to equity, that in the cases whereupon due consideration the cause of the exchequer may appear doubtful, one should incline to the other side. For the favor of the cause of the exchequer does not go so far as to prefer a doubtful pretension of the officers of the exchequer to the interest of particular persons, who are found to be on an equal balance with those of the exchequer, and who may have equity on their side."

(Signed) GEORGE EUSTIS,
of counsel for the defendants.

Afterwards, to wit: on Wednesday, the 27th day of March, in the year aforesaid, at a session of the court aforesaid, holden as aforesaid, the following order was entered on record, to wit:

ESTATE OF WOW. CREVON, deceased, WIFE OF J. B. LA COUR, J. B. VIGNIE, appellee, vs. MIN. BLACHE, regr. appellant. } 2,408.

It is ordered that the rehearing prayed for in these two causes be refused.

CHRISTOVAL G. DE ARMAS AND M. S. CUCULLU, appellees, *vs.* The MAYOR, ALDERMEN and INHABITANTS of the city of New Orleans, appellants. } 2,320.

SUPREME COURT OF THE STATE OF LOUISIANA:

I, N. B. Le Breton, clerk of the Supreme Court for the eastern district of the State of Louisiana, do hereby certify, that the aforegoing thirty-nine pages, numbered from page one hundred and eleven to page one hundred and forty-nine, contain a correct copy of the petition for a rehearing filed in my office by the defendants, in a certain case wherein C. G. de Armas, M. S. Cucullu, were plaintiffs, and the Mayor, Aldermen and Inhabitants of the city of New Orleans, were defendants, and of the order of said court refusing said rehearing.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at the city of New Orleans, this third day of July, 1834.

[SEAL.] N. B. LE BRETON, *Clerk.*

The foregoing transcript, from page first to page one hundred and ten, including the plans, three in number, contain a correct copy of all the proceedings and the record in the above, entitled case in the Supreme Court of the eastern district of Louisiana, where the record now is; and from page one hundred and eleven to page one hundred and forty nine, contains a copy of a petition for a rehearing filed and disallowed by the court on the days mentioned. Whether this forms a part of the *record for the Supreme Court*, is reserved for the consideration of that court. N. Orleans, 3d July, 1834.

CHRIST'L. G. DE ARMAS, *Att'y for Plffs.*
G. EUSTIS, *for Defendants.*

Writ of error, New Orleans and Cucullu et al.

The MAYOR, ALDERMEN AND INHABITANTS of the city of New Orleans, *vs.* CHRISTOVAL G. DE ARMAS AND MANUEL SIMON CUCULLU.

A copy of this writ of error in pursuance of the statute of the United States, in such case made and provided, was lodged in the clerk's office of the Supreme Court for the Eastern District of Louisiana, for the above named C. G. de Armas and M. S. Cucullu, on the 10th April, 1834. New Orleans, June 27, 1834.

N. B. LE BRETON, *Cl'k.*

SUPREME COURT OF LOUISIANA, *E. D.*

This original writ of error, filed in my office, this 10th day of April, 1834.

N. B. LE BRETON,
Clerk of Sup. Court, E. D.

UNITED STATES OF AMERICA, *ss.*

[SEAL.] The President of the United States of America, to the honorable the judges of the Supreme Court of the State of Louisiana, or the Eastern District, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said court, being the highest court of law or equity of the said State, in which a decision could be had in the said suit, between the Mayor, Aldermen and inhabitants of the city of New Orleans, appellants, and Christoval G. de Armas and Manuel Simon Cucullu, appellees, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; and also, where is drawn in question the construction of a clause of a treaty of the United States, and the decision is against the title, right, privilege and exemption claimed by one of the parties under such clause, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf: Do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of August next, in the said Supreme Court of the United States, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done *to be done* therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Honorable John Marshall, Chief Justice of said Supreme Court of the United States, the second Monday of January, eighteen hundred and thirty-four.

WM. THOS. CARROLL,
Clerk of the Supreme Court of United States.

I allow this writ of error.

JOHN McLEAN,
Justice Sup. Court U. States.

THE MAYOR, ALDERMEN AND CIT. of New Orleans,
vs.
C. G. DE ARMAS AND M. S. CUCULLU. } In error.

Citation of appeal, with service and authenticaion.

UNITED STATES OF AMERICA.

To Christoval G. de Armas and Manuel S. Cucullu, greeting:
You are hereby cited and admonished to be and appear at a Supreme

Court of the United States, to be holden at Washington on the 1st Monday of August next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Louisiana, for the Eastern District, wherein the Mayor, Aldermen, and inhabitants of the city of New Orleans are plaintiffs in error, and you are defendants in error, to show cause if any there be, why judgment rendered against the said Mayor, Aldermen and inhabitants of the city of New Orleans, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John McLean, one of the associate justices of the Supreme Court of the United States, this 24th day of March, A. D. 1834.

JOHN McLEAN,
Justice Sup. Court U. S.

A copy of this citation, in pursuance of the statute of the United States in such case made and provided, was filed in the clerk's office for the Eastern District of Louisiana for the above named defendants, C. G. de Armas, defendants in error, on the 10th of April, 1834: the original filed the same day. New Orleans, June 27, 1834.

(Filed) interlined,

N. B. LE BRETON, *Cl'k.*

John Nicholson, United States Marshal of the Eastern District of Louisiana, being duly sworn, declares that he served the within citation of appeal on each of the defendants, to wit, on the 9th of June, 1834, on the defendant Christoval G. de Armas, and on the 7th June, 1834, on the other defendant, Manuel S. Cucullu, by delivering an exact copy of the same duly certified, to each of the defendants in person, and by showing and reading the original to each of said defendants at the time of delivering a copy thereof.

Service made as above stated, on the sixth and seventh days of June, one thousand eight hundred and thirty-four, in the city of New Orleans. New Orleans, June 11th, 1834.

JOHN NICHOLSON,
U. States Marshal Eastern Dist. of Lou'a.

Sworn to and subscribed bofore me at New Orleans, this 11th day of June, 1834.

H. A. BULLARD,
Judge of Supreme Court of Lou'a.

UNITED STATES OF AMERICA, *State of Louisiana.*

By A. B. Roman, Governor of the State of Louisiana: These are to certify, that Henry A. Bullard, whose name is subscribed to the instrument of writing herein annexed, is and was at the time of signing the same, a judge of the Supreme Court of the State of Louisiana, and that full faith and credit are due to his acts as such.

Given at New Orleans, under my hand and seal of the State, this eleventh day of June, one thousand eight hundred and thirty-four, and of the Independence of the United States, the fifty-eighth.

A. W. ROMAN.

[SEAL] By the Governor.
GEORGE EUSTIS, *Secretary of State.*

Copy of Appeal Bond, New Orleans vs. *Cucullu et al.*

Know all men by these presents, that we, the Mayor, Aldermen and inhabitants of the city of New Orleans and Daniel Webster, are held and firmly bound unto Christoval G. de Armas, and Manuel S. Cucullu in the full and just sum of three hundred dollars, to be paid to the said Manuel S. Cucullu and Christoval G. de Armas, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this day of , in the year of our Lord, one thousand eight hundred and thirty-four.

Whereas, lately at a Supreme Court of the State of Louisiana, for the Eastern District, in a suit depending in said Supreme Court, between the Mayor, Aldermen and inhabitants of the city of New Orleans, appellants, and Christoval G. de Armas, and Manuel S. Cucullu, appellees, judgment was rendered against the said Mayor, Aldermen and inhabitants of the city of New Orleans, and the said Mayor, Aldermen and inhabitants of the city of New Orleans having obtained a writ of error, and filed a copy thereof in the Clerk's office of the said Supreme Court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Christoval G. de Armas and Manuel S. Cucullu, citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of August next.

Now the condition of the above obligation is such, that if the said Mayor, Aldermen and inhabitants of the city of New Orleans shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) DANIEL WEBSTER, [SEAL.]

Signed, sealed, and delivered in the presence of
(Signed) WILLIAM THOMAS CARROLL.

The Mayor, Aldermen and inhabitants of New Orleans, by
D. PRIEUR, *Mayor.* [SEAL.]

Signed, sealed, and delivered, by the Mayor of New Orleans, D. Prieur, in presence of G. EUSTIS.

The original of this bond, filed in the clerk's office of the Supreme Court of the Eastern District of Louisiana in the case of the Mayor, Aldermen and inhabitants, plantiffs in error, against C. G. de Armas, and M. S. Cucullu defendants, on the 10th of April, 1834.

N. B. LE BRETON, *Clerk.*

A copy of this bond.
Approved.

(Signed) JOHN McLEAN,
Justice Supreme Court U. S.

SUPREME COURT OF THE UNITED STATES.

The MAYOR, ALDERMEN AND INHABITANTS of the city of New Orleans, plaintiffs,
vs.
CHRISTOVAL G. DE ARMAS AND MANUEL S. CUCULLU, defendants.
} In error.

Assignment of Error.

The judgment of the Supreme Court of the Eastern Disirict of the State of Louisiana, affirming the judgment of the court of the first district of said State, is eroneous, and ought to be reversed, and judgment ought to be rendered in favor of the plantiffs in error, with costs, for the following reasons, and such others as may appear on the record.

1. The spot of ground in controversy makes part of an open space in front of the city of New Orleans called a *quay*, which by the ancient plans of the city was constituted a quay, or public place, and dedicated to public use as well by its designation on said plans, as by the sovereign authority, and by its use and occupation for public purposes.

2. The rights of the former sovereigns of Louisiana over this place was a matter of prerogative, varying according to the institutions of the different governments which have held Louisiana, but always inseparable from the sovereignty.

3. The right of use of this place by the public is a vested right; is a species of property in which the inhabitants of Louisiana are protected under the third article of the treaty of cession.

4. By the treaty of cession, Louisiana was ceded in full sovereignty to the United States.

5. The United States held *this* sovereign power during the time they held the sovereignty of Louisiana, but by the admission of Louisiana into the Union, *this* branch of sovereignty was vested in the State of Lousiana, and under the constitution could not exist in the United States.

6. The power of regulating the use or of appropriating or changing the destination of public places belongs to the sovereign power alone.

7. Since the admission of Louisiana into the Union on a footing with the original States, the United States had no power to interfere with the property or use of any public place in Louisiana.

8. The plantiffs in error who are, under the laws of Louisiana, the proper parties to vindicate the public rights, held the place in controversy by permission of, and by the authority of the State of Louisiana, as will appear by the charter of the city of New Orleans and the laws of the State, and claimed the undisturbed use thereof by virtue of the treaty of cession, and under the act of Congress, passed on the 8th of April, 1812, for the admission of Louisiana into the Union, and the decision of the Supreme Court of the Eastern District of Louisiana is against the title, rights, and privileges thus claimed by the plantiffs in error, and in this is contrary to the provisions of the treaty and law of the United States, and ought therefore to be reversed.

THO. CURRY.

Attorney for the plaintiffs in error.